Department for Business & Trade

Department for Science, Innovation & Technology

Digital Markets, Competition and Consumers Bill

Annex 4: Impact assessment of wider measures

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Any enquiries regarding this publication should be sent to us at:
enquiries@businessandtrade.gov.uk

Contents

Wider competition policy reforms 3
Reforms to markets 3
Reforms to the Competition Act 1998 20
Wider consumer policy reforms 41
Strengthening consumer enforcement powers 41
Prepayment protection – unregulated “savings schemes” 58
Alternative Dispute Resolution 66
Retaining consumer protections from unfair business practices 81
Power to Amend List of Automatically Unfair Practices 81
Cross-cutting reforms 98

Wider competition policy reforms

Reforms to markets

1. **This section considers the impacts of the amendments to Part 4 of the Enterprise Act 2002 (EA02) – i.e., changes to the 'markets regime'.**

Background

2. The markets system involves two potential stages: a more light-touch market study and an in-depth market investigation[1]. The legal powers that allow the CMA to undertake a market study or a market investigation are contained in the EA02, as amended by the Enterprise and Regulatory Reform Act 2013 (ERRA)[2]. This system allows the CMA to examine and remedy markets that appear to not be working for consumers, by reviewing the market, rather than focusing on the behaviour or proposed transactions of individual firms.

3. Market studies are examinations into the causes of why particular markets appear to be not working well for consumers. They consider regulatory and other economic drivers in a market and patterns of business and consumer behaviour. If a market study discovers reasonable grounds for suspecting that any feature of a market is preventing, restricting or distorting competition, the market may be referred (with a Market Investigation Reference) for a detailed market investigation[3]. The CMA may accept undertakings in lieu (UIL) of a reference, where commitments are made by participants in a market that would resolve the concerns about competition.

4. Market investigations are detailed examinations into whether or not there is an adverse effect on competition in the market referred. If an adverse effect on competition (AEC) is found, the CMA must take action, so far as it considers reasonable and practicable, to remedy, mitigate or prevent the adverse effect concerned, so far as they have resulted from, or may be expected to result from, the adverse effect on competition. This may be by accepting undertakings by market participants or imposing an order to remedy the issue directly. The CMA might also take action such as making recommendations to government or other regulators.

5. It is not necessary for there to be suspicion of a breach of consumer or competition law to open a market study or market investigation. As a result, the scope of harms that can be addressed through remedies imposed via a market investigation are much wider than those that can be addressed through consumer and competition enforcement, or through a review of a specific merger. These features of market studies and market investigations make them important tools for maintaining competition in the UK.

6. The CMA can instigate a market study due to harms to competition arising from supply-side and demand-side factors. For instance, on the supply-side, due to high barriers to entry or expansion which makes it difficult for new entrants or smaller firms to compete with large incumbents, or where there is collusion that is not sufficient to enable enforcement action under prohibitions against anti-competitive behaviour. Other harms come on the demand side, for instance where there are informational asymmetries between firms and consumers, high search costs or barriers to switching. Increasingly, behavioural factors are becoming understood as presenting barriers to competition, for instance where consumers find difficulties in identifying best value offers due to choice

[1] Market studies are sometimes referred to as 'Phase 1' of a markets case, with market investigations referred to as 'Phase 2'.
[2] Prior to 2002 there was a related provision for 'monopoly investigation' under the Fair Trading Act 1973.
[3] Certain sectoral regulators also have the power to conduct market studies in markets related to their sectors, following which they can make Market Investigation References, but only the CMA can undertake a market investigation.

overload, framing biases or loss aversion. The markets system allows all these types of harm to be investigated and remedied.

7. The powers and functions of the CMA set out in Part 4 EA02 extend to England, Scotland, Wales and Northern Ireland. For the CMA to taken action in a particular market, a feature, or combination of features which restricts or distorts competition in connection with the supply or acquisition of any goods or services in the UK or a part of the UK must be identified.

Rationale for Intervention

8. The underlying rationale for government intervention is to maintain a regulatory framework which can adequately tackle the market failures associated with weak competition. Weak levels of competition can lead to particular firms gaining entrenched market power which in turn can lead to inefficient outcomes and harm consumer welfare through higher prices and less choice.

9. The detriment to society that results from weak competition, through loss of consumer welfare, reduced incentives to seek productivity gains or pursue innovation, is likely to outweigh any benefits individual firms obtain from it, including the ability to charge supra-competitive prices. Social welfare can therefore be improved by an intervention from government to correct the features of markets that have weakened competition or allowed market power to develop which in turn has led to consumer detriment.

10. Over the first three years after the CMA was formed (2014 to 2017), the CMA estimated the direct total consumer benefit of its market interventions to be £2,661m (£887m annually)[4]. Over the next three years (2018 to 2020), the CMA's estimated direct impact of market interventions was £2,518.5m (£839.5m annually)[5].

11. The CMA's markets system is a powerful tool with a large amount of flexibility to address competition problems in UK markets. The estimates of direct benefits from market investigations are generally high compared to the comparable estimates of benefits coming from other CMA activity such as merger review and consumer and competition enforcement.

12. Furthermore, out of the market investigations opened since the CMA's creation in April 2014, all these markets were found to have features with adverse effects on competition. Despite the success of the regime, there are several potential issues with the current market inquiries system that if resolved, will lead to more efficient inquiries for the benefits of both consumers and businesses.

Lengthy investigations

13. Recent market investigations have taken a long time to resolve. The total duration of the end-to-end process (from commencement of the market study to production of the market investigation report) took over 30 months for energy and over 28 months for retail banking. Even when the statutory timescales are followed without extension, the end-to-end process can take 24 months[6], and the timelines may also follow a long pre-launch process.

14. An efficient market investigation is in the interests of businesses and investors just as much as it is in the interests of consumers. Efficient investigations reduce the period of time in which there is uncertainty over whether the CMA might impose remedies and the

[4] CMA Impact Assessment 2016/17

[5] CMA Impact Assessment 2019/20

[6] This figure assumes an adverse effect on competition is identified. Therefore, the market investigation follows the statutory timescale of 18-months from making the market investigation reference to publishing the final report. This then adds an additional 6-months to accept final undertakings or make a final order when implementing remedies.

nature of those remedies, and reduces the length of time any competition issues identified are able to persist.

15. Market studies and market investigations are resource intensive for the CMA as well as placing a burden on businesses who have to comply with information requests as part of the process. To some extent this is inevitable: the system is designed to allow a comprehensive review across a market, and where the market is large or complex this can be a challenging task requiring the assimilation and analysis of a large amount of information. Given the scale of the CMA's potential powers, it is necessary that this is undertaken with the appropriate level of care and scrutiny, and parties have recourse to challenge decisions or remedies made in markets cases in the Competition Appeal Tribunal. Successful challenges were made against decisions made by the Competition Commission in the Groceries and the Payment Protection Insurance market investigations in 2009 before the CMA was formed in 2013 and in the Private healthcare market investigation opened in 2012.

16. Concerns over the length of time market investigations take to complete are not new, the 2011 consultation noted that "the length of time taken to process cases through the markets regime is a major cause of concern for business". Following this the 12-month statutory deadline for a market study and 18-month statutory deadline for market investigations were proposed in consultation[7] and subsequently implemented. The amendments also require the CMA to accept final undertakings or make a final order within six months of the date of publication of its market investigation report. Consultation on any proposed remedies will need to happen during this six-month period. This may be extended by up to four months, but only if there are deemed to be special reasons for doing so.

17. Despite the introduction of the statutory deadlines for market inquiries, evidence suggests that market investigations are still taking longer to complete. When inspecting the outcomes of market investigations opened since April 2014 (when the CMA came into existence), on average it took the CMA roughly 23-months to complete a market investigation. Therefore, more often than not, the CMA needs an additional 6-months extension beyond the 18-month statutory completion time scale.

18. Currently, a market investigation reference must specify:

    - In the case of an ordinary reference, the description of goods or services to which the feature or combination of features concerned relates (section 133(1)(c) EA02); or
    - In the case of a cross-market reference,[8] the feature or features concerned and the descriptions of goods or services to which it or they relate (section 133(1)(d) EA02).

19. The question to be considered by the CMA group in a market investigation reference is whether "any" feature, or combination of features, of the market gives rise to an AEC (section 134(1) EA02). Hence, in practice, the group consider all potential issues with the market even if the market investigation reference itself is more limited. The absence of flexibility to narrow the scope across all market investigations highlights a potential explanation as to why investigations are taking longer than might be desirable.

20. Reducing the time and costs of running a market investigation is in the interests of all involved parties. More efficient market investigations will enable the CMA to dedicate time

[7] BIS (2011) A competition regime for growth: a consultation on options for reform p 25

[8] Under section 131(6) EA02, a "cross-market reference" is a reference which relates to more than one market in the United Kingdom for goods or services.

and resource elsewhere whilst remediating identified adverse effects on competition more quickly to the benefits of both consumers and businesses.

Lack of flexibility in remedies

21. Following a market investigation, the CMA must prepare and publish a report on its findings and assess whether the market investigation has revealed an Adverse Effect on Competition (AEC). Where the CMA identifies an AEC, it must decide and state in its Final Report what action should be taken for the purpose of remedying the AEC. The CMA is then under an obligation to take action to remedy this AEC. The CMA must accept final undertakings or make a final order within six months of the date of the final publication of the market investigation report[9]. This six-month period includes a period of formal public consultation.
22. The CMA has a broad range of remedies available to remedy the AEC outlined in its Final Report. The Final Report will also contain detailed consideration on the nature and scope of viable remedies to provide a firm basis for subsequent implementation. These can include structural remedies, such as the requiring of divestiture of a business or assets to a market participant, or intellectual property (IP) remedies, including licensing or assignment of IP rights or requiring access to new releases or upgrades of technology.
23. Being able to impose remedies directly without the requirement for Parliamentary assent represents a significant power given its potential to impact the outcomes for a firm. However, these have been used relatively infrequently[10].
24. Following the Final Report, the CMA will consult with the relevant businesses in order to implement remedies to the AEC (either by accepting a final undertaking from the businesses concerned, or by imposing a final order). In this process of designing the remedies, the CMA does not currently have powers to conduct 'implementation trials' or 'field trials' of its proposals, before taking a final decision.
25. The CMA is required to keep final undertakings and orders under review and to ensure that they are complied with; it is also required to consider whether, by reason of a change of circumstances, there is a case for release, variation, supersession or revocation[11].
26. Remedies put in place following market investigations can sometimes fail to achieve the required remedial effect as set out in the Final Report. For example, the remedy introduced following the Annual Summaries on Overdraft Charges (2009) investigation opened by the CMA's predecessor, was openly criticised by the Financial Conduct Authority. After having conducted rigorous statistical analysis on two banks, the FCA found 'that the introduction of annual summaries – a regulatory–driven innovation – had no important effect on the behaviour of customers'[12].
27. Market investigations are constrained by restrictions on the CMA's ability to review and revise remedies after the conclusion of a market investigation. The CMA must consider whether, by reason of a 'change in circumstance', these are no longer appropriate and:
    - in the case of undertakings, whether one or more parties needs to be released from it, or the undertaking needs to be varied or superseded by a new enforcement undertaking;[13]

[9] Section 138A of the EA02
[10] Divestment was used in the BAA airports market investigation (2009) and the Aggregates, cement and ready-mix concrete market (2014). Both of these were completed by the Competition Commission before the CMA came into existence.
[11] Under sections 92(1), (2) and (3) and 162 (1), (2) and (3) of the EA02
[12] The Financial Conduct Authority (2015), Message received? The impact of annual summaries, text alerts and mobile apps on consumer banking behaviour
[13] S.162(2)(b).

- in the case of orders, whether the order needs to be varied or revoked.[14]

28. This existing legislative framework restricts the CMA from being able to vary or supplement existing remedies, simply on the basis that the remedies are shown to be ineffective.

29. Given that the CMA's market inquiry powers are arguably its most impactful tool in addressing competition concerns this highlights areas for improvement in the UK's competition system. Furthermore, the associated risk of obsolete remedies and a rigid remedy review process increases with increasingly fast-moving markets.

Road Fuel Market Study

30. From 2021 to 2022, the price of petrol and diesel went up by 60 pence per litre following Russia's invasion of Ukraine[15]. Against this rapid increase, the then Secretary of State for BEIS requested the CMA to carry out an urgent review of the road fuel market, which reported in July 2022. The CMA was asked to consider the health of competition in the market, geographical factors, and further steps government could take to strengthen competition or increase fuel price transparency for consumers.

31. The CMA found that there were local variations in the price of road fuel, including pricing disparities between urban and rural areas[16]. The findings in the urgent review prompted the CMA to follow up with a year-long market study to explore whether the retail fuel market has adversely affected consumer interests, and to assess how far weaknesses in competition might be driving higher retail prices in certain parts of the UK.

32. In the CMA's Road Fuel Market study[17], it found weakened competition at a national level, price variations between local areas and high motorway prices. The weakening in competition was largely found to arise from fuel retailers deciding to relax competitive pressure in effort to maintain higher prices and increase profit margins even after global fuel prices had fallen. From 2019 to 2022, the CMA estimated that higher margins for four supermarket fuel retailers alone led to consumers paying £900m more than would have otherwise been the case.

33. The CMA's Road fuel market study found some correlation with falls in retail fuel prices and announcements, showing soft power effects on fuel prices. For example, after the publication of the CMA's interim update in December 2022, Asda cut fuel prices by 5 pence per litre and the RAC reported that the supermarkets cut diesel prices by more than 7 pence per litre after the CMA published its May 2023 update. Now that the market study has concluded, the CMA will only be able to gather evidence on a voluntary basis and soft power effects on fuel prices will be diminished.

34. There is a risk that without intervention, these issues could be exacerbated. The CMA therefore recommended the government introduce:

    a. a statutory open data scheme for prices in the retail road fuel sector. This would require all petrol filling stations (PFSs) in the UK to share their prices on an open and real-time basis and allow drivers to easily compare prices to help them to find cheaper fuel.

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[14] S.162(2)(c).
[15] CMA https://www.gov.uk/government/publications/road-fuel-review/road-fuel-review CMA Road fuel review (2022) https://www.gov.uk/government/publications/road-fuel-review/road-fuel-review
[16] CMA Road fuel review (2022) - https://www.gov.uk/government/publications/road-fuel-review/road-fuel-review
[17] CMA Road fuel market study (2023) - https://www.gov.uk/cma-cases/road-fuel-market-study

b. an ongoing road fuels price monitoring function within an appropriate public body and provide it with information-gathering powers, to monitor developments in the market, both nationally and locally, as we move through the net zero transition, provide ongoing scrutiny of prices, and consider whether further action may be needed to protect consumers.

35. Given the CMA's findings of weakened competition in the road fuel retail market, the government accepted the CMA's recommendations.

36. A monitoring function would act as a deterrent to fuel retailers taking actions that would further weaken competition and it would provide an ongoing assessment of the effectiveness of competition in the market. Furthermore, it would allow advice to be provided the government on when further intervention may be required to increase competitive pressures in the market.

37. The government has decided that the CMA is best placed to undertake the monitoring function given its expertise and experience. However, in order for it to do this in an effective way, it requires statutory and targeted information-gathering powers.

38. The transition to ban the sale of new petrol and diesel vehicles from 2035 may affect less well-off customers unable to afford electric vehicles, or those in rural areas where charging infrastructure is harder to access[18]. Given the CMA's findings in its final market study report, the expected future path that the road fuels market will take and the impact of similar functions internationally we have concluded that the establishment of a monitoring function will benefit the road fuels market. It is expected this function will facilitate greater competition and protect consumer interests.

Policy objectives

39. To address these issues government proposes to reform the CMA's market study and market investigation tools to deliver:

    i. faster, more efficient, flexible and proportionate market inquiries;

    ii. more versatile and effective remedies.

    Better inquiries and remedies shall promote competition and yield benefits for consumers and compliant businesses.

Policy Proposals

40. This impact assessment considers two options. A **preferred option**, introducing a package of amendments to EA02 to create a more efficient, flexible and proportionate market inquiry process, and a **do-nothing** option.

41. Overall, the government does not believe there is a need to make significant changes to CMA's current toolbox. Several proposals are being considered in order to make the existing remedy tools more versatile and effective.

42. These two options are described below:

    a. Preferred option – contains a suite of amendments to EA02 which will modernise the market enquiry process. The proposed amendments are:

        i. Providing the CMA with greater flexibility to narrow the scope of market investigations to particular features of particular markets.

[18] Road Fuel Market Study Final Report, CMA (2023) p158 & 159 - https://www.gov.uk/cma-cases/road-fuel-market-study#final-report

ii. Removing the requirement that the CMA consult on launching a market investigation within six months of beginning a market study.

iii. Enabling the CMA to accept early undertakings from businesses at any stage of the market inquiry process.

iv. Enabling the CMA to require that businesses undertake implementation trials for some types of market investigation remedies.

v. Improving flexibility for the CMA to vary and amend remedies imposed following market investigations, on the grounds that they are ineffective at remedying the Adverse Effect on Competition

vi. Providing the CMA with information gathering powers in the road fuel market so that it can carry out the ongoing road fuel prices monitoring function effectively, as recommended by the CMA's Road Fuel Market Study

b. Do-nothing – this option leaves the market inquiry process unchanged and acts as the counterfactual to the preferred option.

Summary of the preferred option

43. The preferred option offers a package of measures which have been designed to improve the current market inquiry process through either streamlining the process itself or improving the effectiveness of the way in which the CMA can implement remedies.

44. The proposals are not a drastic change from the status quo, rather they are expected to quicken the way in which inquiries can be started and bought to an end through streamlining procedures.

45. Furthermore, providing the flexibility for the CMA to narrow the scope of the investigation will ensure they are conducted in a focussed and efficient manner which limits the time taken and the associated uncertainty imposed on affected businesses. This is likely to have little cost to business or the Exchequer and is likely to present cost savings relative to the status quo as investigations are conducted more efficiently.

46. The opportunity to accept early undertakings from businesses at any stage of the market inquiry process offers a new avenue to implementing competition remedies in a more proportionate manner. Currently, the CMA may accept commitments (or voluntary undertakings) only at the point where it intends to make a market investigation reference or following conclusion of the Final Report. The effect of the commitments at the earlier stage is to prevent the market investigation reference from being made. The policy allows the CMA to accept commitments for the purpose of remedying an AEC at any stage during a market study, market investigation or where the CMA is in the position to make a market investigation reference. In addition to greater flexibility on timing, the policy allows the CMA to accept commitments for the purpose of remedying a subset of the competition problems it has identified a market.

47. The proposals also address the way the CMA settle remedies, providing powers for the CMA to run implementation trials for certain types of remedy, and enhance its powers so that it can revise remedies which have been found to be ineffective. Remedy trials have proved successful for the concurrent sector regulators and this will improve the effectiveness and longevity of the CMA's own market inquiry remedies.

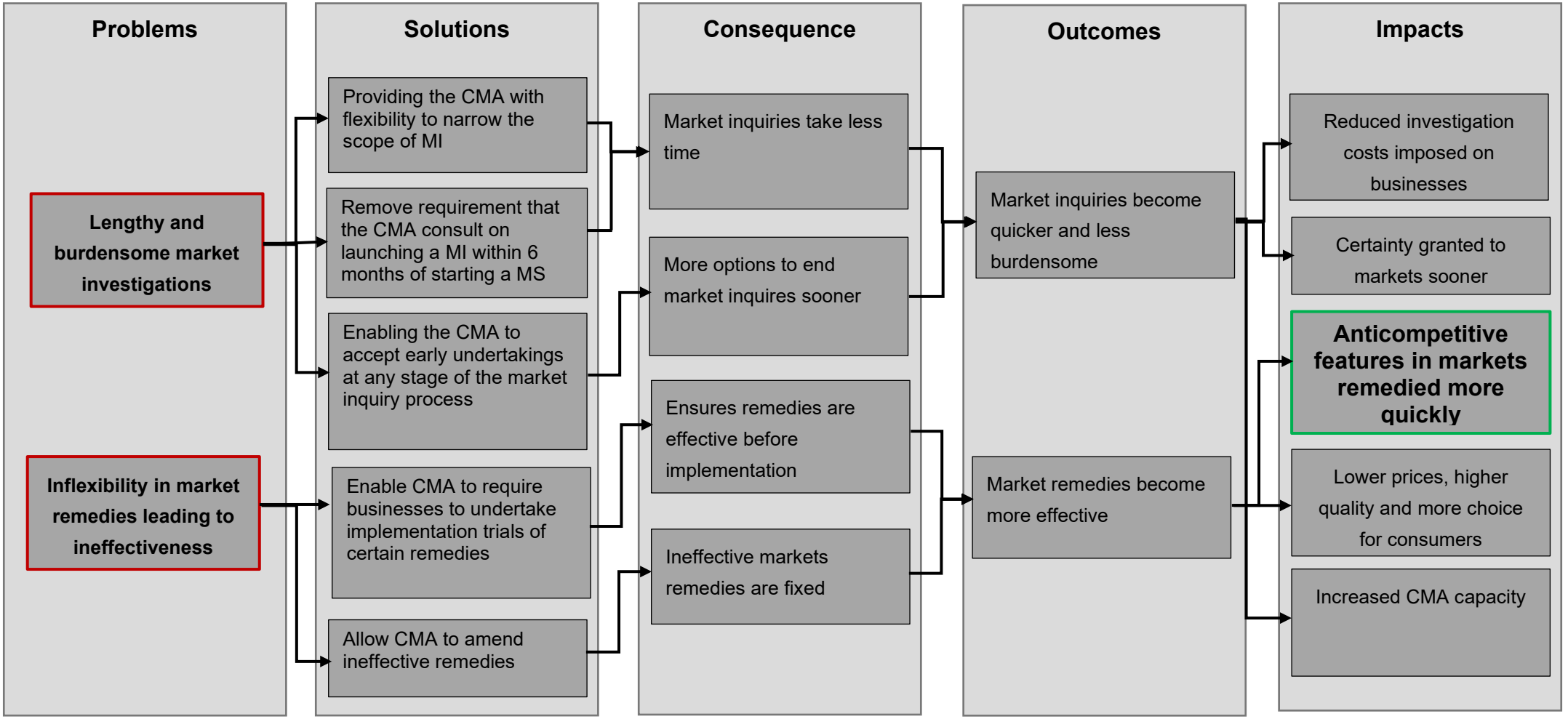
48. Given the scope for remedies to correct whole markets with poor outcomes for consumers, there is considerable scope for this measure to deliver substantial benefits to consumers because of more longstanding and well-designed remedies implemented in these markets.

49. Considering recent trends seen in the road fuel retail market, granting information-gathering powers to the CMA to monitor ongoing UK road fuel prices so that it is able to

provide advice to government effectively will ensure the government is better placed to decide on whether further intervention in the market is needed. This will act as a deterrent to fuel retailers who may take actions to further weaken competition. It will assess the effectiveness of competition in the road fuel retail market and protect consumers in the transition to Net Zero, as well as from price fluctuations caused by global market dynamics. To ensure this measure is proportionate in the burden it places on businesses, this measure has a sunset clause attached whereby a Secretary of State review will determine if the powers are renewed after five years.

50. Figure 1 below illustrates the intended mechanism of how the proposals set out in the preferred option resolve the issues highlighted above and achieve the stated objectives.

Figure 1 - Preferred Option Theory of Change



Cost-Benefit Analysis

51. Given that many of the proposals outlined in the preferred option amend or clarify existing legislation, they are not expected to have a large impact on businesses, particularly since only a handful of businesses will be involved in market inquiries. That said, for the measures where quantification is possible, government has conducted evidence gathering activities on the cost to business using a 'Standard Cost Model' approach.

52. Government has conducted surveys with industry to understand the business resource needed to comply with any additional procedures the amendments are expected to result in. This additional compliance cost to businesses is an opportunity cost as it represents time diverted away from profit-generating business activity. Range estimates have been presented as in reality the compliance cost imposed on a business will vary on a case-by-case basis, and the way it will vary is inherently uncertain. The reported hourly resource has then been multiplied by wage tariffs reported in the Annual Survey of Hours and Earnings[1] (ASHE) and upscaled by a non-wage factor[2] to arrive at an estimated compliance cost of the activity. This activity cost is then multiplied by the number of times government anticipates it will be undertaken (and by how many businesses) to arrive at an aggregate cost impact on businesses.

53. Given that these changes concern the UK competition regime and aim to enhance competition through more effective markets enforcement this section considers whether and where administrative exclusion D (pro-competition) applies. Proposals where the exclusion does apply mean the measure will be classified as a NQRP and therefore it's business impacts will not contribute to the BIT[3]. A regulation meets the pro-competition administrative exclusion if it satisfies the following criteria:

    a. The measure is expected to increase, either directly or indirectly, the number or range of sustainable suppliers; to strengthen the ability of suppliers to compete; or to increase suppliers' incentives to compete vigorously.

    b. The net impact of the measure is expected to be an increase in [effective] competition (i.e. if a policy fulfils one of the criteria at (a) but results in a weakened position against another) and the overall result is to improve competition.

    c. Promoting competition is a core purpose of the measure.

    d. It is reasonable to expect a net social benefit from the measure (i.e. benefits to outweigh costs), even where all the impacts may not be monetised.

54. The following paragraphs consider the reforms against these criteria. The most likely direct, pro-competition effect would be an enhanced ability to compete on fair terms due to more effective enforcement. As per Figure 1, the changes are expected to enable more effective remedies to anti-competitive market features earlier. This in turn should increase business compliance because poor practices would be addressed sooner and more effectively. Market inquiries may also indirectly promote the number or range of sustainable suppliers in a market in some cases.

55. All the preferred option's components are expected to have a positive impact on competition, through different mechanisms, and none is expected to dampen

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[1] Annual Survey of Hours and Earnings: 2021 provisional results. Table 14.6a Hourly pay - Excluding overtime (£) - For all employee jobs: United Kingdom, 2020.
[2] Derived from Eurostat data on wages and non-wage labour costs https://ec.europa.eu/eurostat/statistics-explained/index.php/Hourly_labour_costs#Non-wage_costs_highest_in_France_and_Sweden
[3] https://www.gov.uk/government/publications/better-regulation-framework

competition. In combination with the considerations from the previous paragraph, the net impact of the proposals is expected to be an increase in competition. Again, as per Figure 1 and the preceding paragraph, promoting competition is a core purpose of the changes.

56. It is also reasonable to expect a net societal benefit of the changes from positive impacts on product price, quality, choice, and innovation. While these positive impacts of an enhanced markets regime could not be quantified due to a lack of robust data, available evidence suggests that these benefits would likely outweigh any costs placed on businesses due to the wide-reaching impact they would have on a range of consumers. Therefore, it is reasonable to expect a net social benefit from the reforms (para. 98).
57. In conclusion, any quantified impacts on businesses for these measures meet the criteria for the pro-competition exemption and thus are classified as non-qualifying regulatory provisions (NQRPs), where the associated business costs will not be factored into the BIT score.
58. None of the measures are expected to impose costs on consumers. Market inquiries concern the conduct of businesses and therefore the proposals will not directly affect consumers as they only introduce compliance costs on businesses. Where the proposed measures are expected to promote competitive outcomes, this will benefit consumers. Given a lack of available evidence and inherent unpredictability around which markets these benefits will be delivered in, they have been assessed qualitatively.
59. Where quantification has not been completed given a lack of robust quantitative evidence on how some of the less significant modifications to existing processes may impact businesses, a qualitative description has been provided, justifying the approach taken and describing the impact the measure is expected to have. This has been deemed as a proportionate approach given this appraisal concerns several subtle amendments to existing procedures which are not expected to impose large costs on businesses.
60. **All presented cost estimates are in £2021 prices unless stated otherwise**

Providing the CMA with greater flexibility to narrow the scope of market investigations to particular features of markets.

61. If the CMA has reasonable grounds to suspect that a market has a feature(s) which has an adverse effect on competition during a market study, it can refer to the issue for a more in-depth market investigation. Government considers that market investigations could be made more efficient if the CMA had greater ability to prescribe the scope of market investigation references to focus its investigation. The CMA could use this increased focus to conduct more efficient and proportionate market investigations which examine the most prominent causes of competition concerns whilst ensuring the inquiry is no wider than necessary.

62. **Given that the CMA would retain the ability to make a market investigation reference without such prescription, this measure has been deemed to not have any cost to business or the Exchequer.** That said, the streamlining of market investigations is likely to have wider benefits to businesses who will receive certainty in market investigations sooner and to consumers who will receive the benefits of market cases which are resolved more quickly.

63. Furthermore, this is likely to have a positive impact on CMA resource given it offers the opportunity for investigations to be streamlined where appropriate, presenting a saving to the Exchequer.

Removing the requirement that the CMA consult on launching a market investigation within 6 months of beginning a market study.

64. Currently, the CMA must consult on launching a market investigation within six months of beginning a market study.

65. This risks the CMA either consulting unnecessarily if it considers that a reference may be relevant, only to discover later during the market study process that it is not, or failing to take the opportunity to consult during a market study in which it becomes apparent at the later stages that a reference would have been suitable. This is unduly restrictive whilst not materially speeding up the making of a market investigation reference.

66. Removing the 6-month time requirement to consult by eliminates this risk of restricted decision-making and given that the CMA would have to consult anyway to launch an investigation it is cost neutral. Furthermore, large cost savings will be made in cases where the removal of this requirement results in the avoidance of unnecessary market investigation references.

67. **This proposal will not increase the level of costs currently imposed on businesses or other parties during the market inquiry process.** This proposal will introduce cost savings where sub-optimal market investigations references are avoided.

Enabling the CMA to accept early undertakings from businesses at any stage of the market inquiry process.

68. Allowing the CMA greater flexibility to accept early undertakings would give extra flexibility to the CMA and parties to negotiate a quicker resolution to a competition problem than waiting for the investigation to conclude. This could lead to faster resolution of consumer detriment and a reduction in costs to businesses participating in the market inquiry process if the commitments reduced the need for further information requests or other activity on behalf of the investigation.

69. Furthermore, market inquiries introduce uncertainty to markets where outcomes are unclear. Where early undertakings lead to the earlier conclusion of market inquiries certainty will be granted to businesses sooner.

70. In some cases, commitments accepted during the process may not be sufficient to close the whole investigation but may narrow the scope and speed the conclusion of the rest of the inquiry.

71. The CMA may have more information available to it on the functioning of a market by the end of a complete investigation, than at earlier stages. This would suggest that remedies imposed at the end of a full inquiry may be more effective than commitments accepted earlier on. That said, allowing greater flexibility for earlier commitments increases the flexibility for the CMA to apply remedial action in circumstances where it has high quality information earlier in an investigation. Furthermore, the CMA would be under a duty to have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the AEC concerned. Government would expect the CMA to accept earlier commitments where it is confident that the commitments offered are an effective remedy to the AEC concerned. Considering these pre-conditions, it is anticipated that this new tool will be used on relatively few occasions.

72. Considering this, government is confident that the benefits delivered by this measure far outweigh any risks associated with earlier commitments accepted in place of more substantial remedies. Currently the pressing issue with market inquiries is their length and a lack of flexibility to introduce remedies without undertaking a full market investigation. This measure alleviates both issues.

73. **This is a costless option to businesses as it adds an additional option which enables them to voluntarily offer commitments to promote the faster resolution of market inquiry processes.**

Enabling the CMA to require that businesses undertake implementation trials for certain market investigation remedies.

74. An effective design process is essential for effective remedies, particularly in some consumer facing markets. The design of remedies can be facilitated by testing customer responses to proposed interventions, such as through using implementation trials.

75. The example cited in the consultation was of a remedy requiring that certain information is communicated to a consumer on a website or by written correspondence, where the CMA had the power to require businesses to test different ways of presenting this information to consumers to ensure maximum engagement. For instance, through different media (text message, email, letter, website pop up) or when the message may be presented (such as before a renewal or at the outset of a purchase process) and how the message is presented.

76. Following evidence gathered from surveys conducted with industry stakeholders, government has estimated that, on average, an implementation trial will impose an **additional £2,200 to £4,300 of internal business administration costs** as well as **£8,600 to £17,000 of external legal advice**. These costs are expected to arise from designing and running the trials as well as the legal cost of engagement and compliance with CMA procedures.

77. Under these assumptions, **the total opportunity cost to one business of participating in an implementation trial is estimated to be between approximately £11,000 and £21,000.**

78. Table 1 below contains the assumed cost breakdown formulated using evidence gathered from surveys with industry stakeholders.

Table 1 - Estimated cost of implementation trial

Occupation	Hourly cost of labour (£)	Hours of time diverted from business activity		Total labour cost (£)	
		Low	High	Low	High
Corporate managers and directors	37.62	34	67	1,300	2,500
Internal Legal professional	44.15	20	40	900	1,800
Administrative occupations: office managers and supervisors	22.64	0	0	-	-
Administrative occupations: records	17.03	0	0	-	-

External Legal	512.00	17	33	8,600	17,000
Total (rounded to £1000s)				**11,000**	**21,000**

79. Following CMA advice, as well as considering the frequency with which market investigation remedies are implemented, it has been assumed that implementation trials will be conducted 0.2 times a year.

80. In the last five years, the CMA has concluded two market investigations. This means roughly 0.4 market investigations are concluded per year. Assuming one remedy about the provision of information to consumers occurs per investigation, this implies 0.4 of this type of remedy occur per year. Assuming the CMA wish to trial 50% of these remedies, this would imply 0.2 remedies relating to the provision of information to consumers are tested per annum.

81. Multiplying this by the per business cost assumption above, leads to an aggregate cost to businesses of **£2,200 to £4,200 per year assuming there are 0.2 additional implementation trials per annum.**

Improving flexibility for the CMA to vary and amend remedies imposed following market investigations, on the grounds that they are ineffective at remedying the Adverse Effect on Competition.

82. If remedies introduced by the CMA are found to be ineffective, they cannot currently be amended unless it is demonstrated that there has been a change in circumstances.

83. Adding the flexibility to vary remedies would allow the CMA to update remedies to tackle ongoing competition problems, leading to benefits for consumers and the wider economy. This would also avoid the cost of the CMA having to start a new investigation to tackle the issue.

84. Additional requests for information will be sent to businesses where improved flexibility to vary remedies leads to additional proposals that a remedy should be altered. This will create an additional cost to business through the required staff resource.

85. Following evidence gathered from surveys conducted with industry stakeholders, government has estimated that, on average, an additional request for information (RFI) related to remedies will impose an **additional £3,000 to £5,700 of internal business administration costs** as well as **£6,900 to £13,600 of external legal advice.**

86. Under the above assumptions, **the total opportunity cost to one business of suggesting varying previous market remedies is estimated to be between approximately £10,000 and £19,000.**

87. Table 2 below contains the assumed cost breakdown formulated using evidence gathered from surveys with industry stakeholders.

Table 2 - Estimated cost of reviewing previous market enquiry remedies

Occupation	Hourly cost of labour (£)	Hours of time diverted from business activity		Total labour cost (£)	
		Low	High	Low	High
Corporate managers and directors	37.62	10	20	400	800
Internal Legal professional	44.15	27	53	1,200	2,300
Administrative occupations: office managers and supervisors	22.64	34	67	800	1,500
Administrative occupations: records	17.03	34	67	600	1,100
External Legal	512.00	13	27	6,900	13,600
Total (rounded to £1000s)				**10,000**	**19,000**

88. The extent to which remedies are varied is inherently uncertain, and ultimately depends on how often the CMA suspect current remedies may be ineffective and subsequently conduct a review.

89. As stated above, there have been up to roughly five market inquiries active at any given time since the CMA's creation, with market investigations typically being concluded at a rate below one per year in recent years. It has been assumed that an additional 0.2 to 0.5 remedies will be reviewed per annum following this reform (i.e., an additional remedy review every two to five years). Market investigations will involve multiple businesses, therefore it is assumed 10 to 20 RFIs will be issued per remedy review. This provides an estimated range of 2 to 10 additional RFIs per annum issued to businesses. This is based on the reasoning that most remedies are operating as intended as well as the fact that the CMA already has some power to review remedies that meet certain criteria.

90. Using the number of staff hours reported by industry, the requests for information are estimated to result in **a total cost to business of £20,000 to £190,000 per year** assuming two to ten additional businesses are involved in the reviews of previous market inquiry remedies annually. Government notes that the implementation of new remedies following successful reviews will introduce additional costs for involved businesses, however this has not been quantified given that this will vary based on the features of the AEC being addressed. This means robust assumptions cannot be developed. Furthermore, where ineffective remedies are replaced by new and effective ones, benefits to other businesses from enhanced competition will nullify costs arising from the business implementing the new remedy.

91. The impact on consumers has not been quantified, however, given that this measure will improve the quality of remedies implemented through market enquiries it is likely to lead to improved consumer outcomes.

Providing the CMA with information gathering powers in the road fuel market so that it can carry out the ongoing road fuel prices monitoring function effectively, as recommended by the CMA's Road Fuel Market Study

92. Granting the CMA information gathering powers to monitor the road fuel market is expected to introduce a small cost on affected road fuel businesses through the resource needed to respond to additional requests for monitoring information. Monitoring will act as a deterrent to PFSs taking actions that would further weaken competition in the market and may help to reduce prices for consumers. The function would also provide an ongoing assessment of the effectiveness of competition in the market and for it to advise the government on when further intervention may be required to increase competitive pressures in the road fuel market.

93. Given a lack of robust evidence, the cost to a road fuel supplier of an additional request for information has been proxied through the estimated cost to a business responding to a request for information relating to the CMA review of a market remedy estimated in this IA (see para. 86). This assumption has been deemed reasonable given this proposal relates to recommendations put forward by the CMA following the outcome of the road fuel market study. As a result, the cost of an additional request for information to monitor the road fuel market is assumed to range from £10,000 to £19,000.

94. Based on the outcome of the market study, and CMA advice, it is assumed that affected businesses will be asked for information several times a year to support regular monitoring reports, though the specific number may vary with the design of the measure. In terms of the businesses in scope, the market study requested information from thirteen[4] road fuel retailers. Based on this it is assumed that ten to twenty road fuel retailers would be subject to the new monitoring power, however the actual specific number and type of businesses may vary with the design of the measure.

95. For the purposes of estimating the cost to businesses of responding to information requests from the CMA, this IA assumes that based on similar monitoring approaches road fuel retailers would likely need to respond to four requests per year. This assumption is reasonable considering the market share of the UK's largest road fuel retailers. However, the actual specific number may vary as this will depend on how often the CMA will publish monitoring reports in a year which will be covered in the upcoming road fuels consultation and the specific circumstances e.g., if follow up requests are needed.

96. Based on the above assumptions, **the total annual cost to businesses is estimated at between £0.4m to £1.5m**. To ensure this measure is proportionate in the burden it places on businesses, this measure has a sunset clause attached whereby a Secretary of State review will determine if the powers are renewed after five years. Therefore, the impacts of this measure are only appraised for five years.

97. The consumer benefit of this proposal has not been quantified due to inherent uncertainty on how the price of road fuel may be affected when considering wider market conditions. However, this monitoring function will help to protect competition in the retail road fuel

[4] As the CMA Road fuel market study outlines (page 77), these 13 businesses comprise of 4 supermarket retailers and 9 non-supermarket retailers/Motorway Service Area (MSA) operators

market. As a result of road fuel retailers competing on price to attract consumers and maintain or increase their market share, there will be an impact on their revenues. Consequently, although more competitive pricing amongst fuel retailers is expected to lead to benefits, such as generating consumer fuel savings, the complementary decrease in fuel revenues for businesses mean that overall, this impact can be considered a transfer between businesses and consumers. Additionally, both the monitoring function and open data scheme for fuel prices will work in a mutually reinforcing way to increase transparency to empower consumers to find the best prices possible for their fuel and increase pressure on PFSs to price more competitively.

Total Impact of amendments to Part 4 of EA02

98. As described above, the package of measures is expected to deliver significant benefits at little cost given many of the proposals streamline and clarify existing processes. Where quantification of costs to business has been conducted, the measures are expected to result in an **overall estimated cost of reforms to EA02 which total £1.7m to £7.4m over the 10-year appraisal period**. The associated **Equivalised Annual Direct Cost to Business (EANDCB) in the central scenario is £0.5m[5].** As discussed, **this EANDCB relates entirely to non-qualifying regulatory provisions** (pro-competition measures) and so **the BIT score of these changes is £0.**

99. A significant portion of the expected costs remain unquantified due to a lack of robust evidence to base assumptions on and therefore do not contribute to the presented EANDCB. These costs have been assessed qualitatively. Given that many of the reforms aim to streamline the existing regime, many of the benefits to businesses arising from a more efficient markets regime also remain unquantified. This approach towards assessing costs has been deemed appropriate considering the scope for the unquantified costs and benefits to cancel one another out.

100. The benefits of the proposals are expected to exceed the costs. These benefits consist of those delivered to consumers who gain from enhanced competition in poorly functioning markets, and to businesses who will gain from savings and increased certainty arising from more efficient market inquiry procedures.

Public sector equality duty

101. The impact of the reforms on the protected characteristics will depend on the number and nature of the market cases that the CMA will undertake with these changes, compared to its expected activity under current arrangements.

102. As the proposed reforms do not drastically deviate from the status quo, the type and number of market cases the CMA takes on is unlikely to change as a result. That said, consumer vulnerability arising from competition concerns will remain a key reason as to why the CMA may begin a market study or investigation. Consumer vulnerability overlaps with protected characteristics in areas such as age and health & disability, though the concepts differ on the other characteristics. Examples of the CMA's recent market cases include the Children's social care study[6] (opened March 2021), Energy market investigation[7] (closed December 2016) and the Care homes market study[8] (closed 2017). These cases demonstrate the potential the CMA's market tools have to protect vulnerable consumers.

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[5] This figure is in 2019 prices and discounted to a 2020 base year.
[6] https://www.gov.uk/cma-cases/childrens-social-care-study
[7] https://www.gov.uk/cma-cases/energy-market-investigation
[8] https://www.gov.uk/cma-cases/care-homes-market-study

103. In line with PSED impact assessment guidance, government has considered whether the reforms to markets will eliminate unlawful discrimination, advance equality of opportunity or foster good relations between people who share protected characteristics. In these regards, it is not expected that any direct impacts or issues will arise as the measures do not actively discriminate against any of the protected characteristics or other consumer groups. Although only a portion of market cases may involve an emphasis on vulnerability concerns, the reforms are anticipated to benefit consumers more broadly through resolving any identified anti-competitive features of the markets under investigation which may be causing consumer detriment (e.g., higher prices or less choice). Therefore strengthening the markets regime will indirectly benefit the protected characteristics alongside all other consumers.

104. **The matters considered in this Impact Assessment do not raise any issues relevant to the public sector equality duty under section 149(1) Equality Act 2010 because the policy does not discriminate or unjustly favour any person or group of people based on their protected characteristics. Therefore, considering these considerations, government will proceed with the reforms as planned.**

Impact on small and micro businesses

105. As indicated in their impact assessment, the CMA tends to focus their market cases on a handful of larger businesses with the ambition of resolving AECs in particular markets. Typically speaking, this is because it is unlikely that a smaller sized business can contribute to the presence of an AEC in a market simply because they do not have the necessary market share to do so. It is possible that small businesses may be investigated for market cases that aim to remediate AECs in local markets, however this is not likely to happen often for the reasons highlighted above. Furthermore, it is not expected that the reforms themselves will change the type and number of market cases which the CMA undertakes given the objectives of the reforms is to refine the existing regime. Therefore it is not expected that the reforms will adversely affect small and micro sized businesses.

106. It is anticipated that small and micro businesses would benefit from these proposals which will allow the CMA to address AECs more quickly. The removal of an AEC could enable smaller and fair practicing businesses to gain market share or even enter different markets that were previously incontestable. This would benefit small and micro sized businesses through effectively creating a more level playing field with larger businesses.

107. Given that the majority of the small and micro-sized business population benefit from the markets regime at no expense, and in the interest of ensuring the CMA can uphold competition in local markets, an exemption to small and micro sized businesses has been deemed inappropriate. Any further mitigating actions would likely either provide little material impact or impede the CMA's ability to conduct investigations in local markets whilst complicating the regulatory landscape for the affected businesses.

Reforms to the Competition Act 1998

108. **This section considers the impacts of the amendments to the Competition Act 1998 (CA98).**

Background

109. Competition may be restricted by the conduct of market participants. Firms may be able to engage in strategic behaviour that maximises their own returns at the expense of damaging competition in a market. Agreements between firms may restrict competition. Alternatively, a firm with a dominant market position may act in ways that exclude others from entering the market or competing fairly.

110. Certain types of anti-competitive behaviour are prohibited under the Competition Act 1998[9] (CA98) and subject to enforcement action by the CMA and the sectoral regulators that hold concurrent enforcement powers to bring CA98 cases in their sectors.

111. Competition enforcement (also known as 'antitrust enforcement') is part of the ex-post element of competition policy, addressing harms and behaviour that have already taken place, although investigation and enforcement activity also deters future harm and provides clarity to businesses about the type of activity that is prohibited.

Anti-competitive agreements

CA98 and the prohibition against anti-competitive agreements

112. Chapter I of CA98 prohibits agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade within the UK and have as their object or effect the prevention, restriction or distortion of competition within the UK[10]. For simplicity in this IA, these types of conduct will be referred to as 'agreements'. The type of behaviour that could cause a breach of the prohibitions includes price-fixing, collusive tendering, resale price maintenance, sharing information related to future prices, sharing markets or creating anti-competitive trade association rules.

The criminal cartel offence

113. In addition, the Enterprise Act 2002 (EA02) created the criminal cartel offence, with the intention of criminalising and deterring behaviour by individuals leading to the most serious and damaging forms of anti-competitive agreements, known as 'hardcore cartels'[11]. The maximum penalty on conviction is five years imprisonment and / or an unlimited fine.

Abuse of a dominant market position

114. Chapter II of CA98 prohibits abusive conduct by one or more undertakings that singly or collectively hold a dominant position in a market and may affect trade in the UK. This includes:

a. **Exploitative abuse**: a firm exploiting its customers, by using its market power to reduce output or increase prices.

b. **Exclusionary abuse**: a firm with a dominant position to prevent rivals from entering or competing effectively using anti-competitive means. These may include predatory pricing[12], using tying[13] or bundling[14] to prevent rivals entering, providing incremental or retrospective discounts on additional purchases to exclude rivals, applying discriminatory standards to independent parties compared to those applied to affiliate companies, refusing to supply downstream rivals an input or refusing to supply upstream rivals with distribution.

115. The provisions against abuse of a dominant position do not prohibit a company from achieving a dominant position in a market. Companies that grow as part of the natural competitive process may take a large share of the market, reflecting greater productivity or efficiencies that benefit consumers. The purpose of these provisions is to prevent a dominant market position being used in ways that causes detriment to competition consumers.

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[9] http://www.legislation.gov.uk/ukpga/1998/41/contents
[10] CA98, Section 2(1)
[11] CMA9 Cartel Offence Prosecution Guidance p 3.
[12] Temporarily pricing below cost to exclude a rival within the same market.
[13] Making the sale of one product conditional on the purchase of another distinct 'tied' product.
[14] Selling a package of two or more goods in fixed proportions.

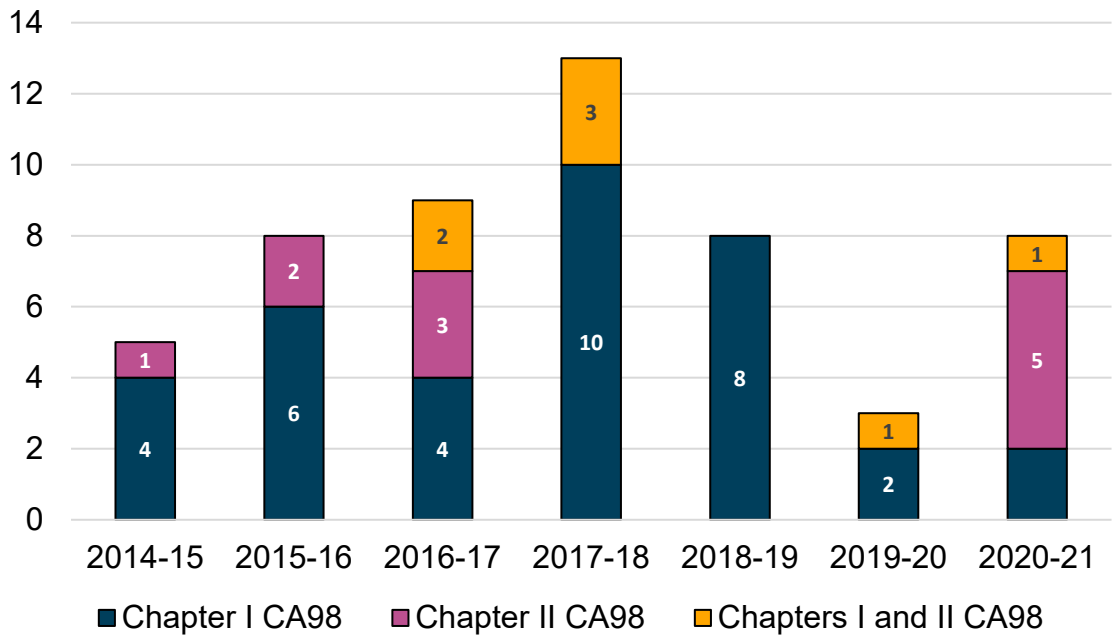
Economic impact of CA98 enforcement

116. The CMA makes ex ante[15] estimates of the benefits to consumers stemming from its CA98 enforcement activity as part of its annual impact assessment. Over the first three years after the CMA was formed (2014 to 2017), the CMA estimated the direct total impact of its competition enforcement interventions to be £414.6m (annual savings of £138.2m), although this includes impacts from the Phenytoin Pfizer Flynn decision that was subsequently remitted back to the CMA on appeal at the Competition Appeal Tribunal. Over the next three years (2018 to 2020), the CMA estimated the direct impact of competition enforcement interventions was £135.6 m (£45.2m annually).

117. Figure 2 below shows the grounds on which past CMA CA98 cases were opened. Although it fluctuates year on year, typically most cases are opened on infringement of the Chapter 1 prohibition relating to cartels and collusion with a relatively smaller number of Chapter II infringements relating to abuse of dominance on a yearly basis (though this was not the case in 2020-21).

118. The CMA has the power to ensure that UK consumers and businesses and the UK economy are protected from anti-competitive practices. The powers and functions granted to the CMA by EA02 are therefore reserved to activities within England, Scotland, Wales and Northern Ireland.

Figure 2 - CA98 cases opened by CMA, April 2014 - present



Deterrence effects

119. The CMA impact assessment estimates described above do not include the potential indirect effect from the deterrence effect of enforcement activity. Enforcement activity raises the expected cost[16] to parties of carrying out harmful behaviour because it signals the CMA's intent and ability to detect and impose sanctions on infringing parties. This is

[15] Impact estimations are conducted immediately after cases are completed and are therefore, based only on information available during the case

[16] Expected cost of carrying out harmful behaviour is the cost of sanction (such as fine or disqualification, discounted by the probability of detection and being subject to sanction), so deterrence can be driven by either an enforcement authority signalling greater likelihood of infringing parties being subject to enforcement action or by raising the penalty – a point relevant to later discussion on proposals around penalties.

not directly observable, and estimates using survey evidence vary widely and carry broad confidence intervals: with a deterrence ratio[17] of between 4.6 to 1 and 28 to 1 for cartels, and between 4 to 1 and 12 to 1 for abuse of dominance decisions[18]. Case study evaluation of four CMA CA98 interventions estimated that the value of the indirect benefits were several multiples of the direct benefits[19].

120. Due to the high degree of uncertainty around estimating indirect benefits, the CMA does not include them in formal estimates of impact, but it may be that the majority of benefits from enforcement activity are likely to come from harmful activity deterred elsewhere rather than those related to the specific enforcement action, and so the actual economic impact of this activity could be much higher.

Territorial Scope of CA98

121. The Chapter I and Chapter II prohibitions in the CA98 include territorial limitations. In particular:

a. The Chapter I prohibition applies to agreements etc. which may affect trade within the UK, and which have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom. Further, the agreement etc. must be, or be intended to be, implemented in the UK.

b. The Chapter II prohibition applies to conduct which amounts to the abuse of a dominant position in a market which may affect trade in the UK, where the dominant position must be within the UK, or any part of it.

122. If the CMA suspects there has been a breach against the prohibitions set out in CA98, and the above jurisdictional tests are met, there are five key powers available to the CMA for the purposes of an investigation:

i. power to require documents and information (s.26);

ii. power to ask questions (s.26A);

iii. power to enter business premises without a warrant (s.27);

iv. power to enter business premises under a warrant (s.28);

v. power to enter domestic premises under a warrant (s.28A).

Rationale for Intervention

Length of CA98 cases

123. The rationale for the underlying government intervention – to maintain and enforce rules against anti-competitive behaviour – remains strong. The relevant policy problem is therefore one of addressing current inefficiencies which mean that anti-competitive behaviour is not dealt with as quickly as could be and where there is potentially insufficient deterrence.

124. The overall volume of cases being brought through the system remains low (see Figure 1), although it has increased in recent years there are challenges to knowing what the true optimum level of enforcement activity should be. Whilst there is evidence that measures of market power have increased in recent years the extent to which this stems from

[17] The number of potential cases deterred for each case subject to successful enforcement intervention.

[18] From surveys of legal firms and businesses in Deloitte (2007) *The deterrent effect of competition enforcement by the OFT* and London Economics (2011) *The impact of competition interventions on compliance and deterrence*; summarised in the literature review of deterrence effects undertaken by CMA (2017) *The deterrent effect of competition authorities' work: Literature review*.

[19] DotEcon (2018) CMA evaluation of CA98 cases: ratios of indirect to direct benefits were 2.7 to 1 (mobility scooters), 12 to 1 (estate agents), 14 to 1 (light fittings), 21 to 1 (bathroom fittings).

underenforcement against illegal anti-competitive behaviour as opposed to other structural changes in the economy which give greater advantages to large incumbents[20] is unclear.

125. The majority of investigations opened and infringement decisions made are for anti-competitive agreements and the abuse of dominance prohibition is used relatively infrequently (see Figure 1). The low number of infringement decisions on exclusionary and exploitative behaviour means there is less case law available and fewer examples to use to clarify the law in guidance and establish greater deterrence. The criminal cartel powers have rarely been used and the CMA has not opened any new criminal cartel investigations since it was created in April 2014.

126. CA98 investigations are typically lengthy - DBT analysis indicates that on average, it took 16 months from opening a case to issuing a Statement of Objection (SO), and if there was a decision of infringement it took 24 months on average[21]. Long investigations can impose high costs on both, involved businesses and the CMA. Furthermore, resource intensive investigations may lower the frequency of CMA enforcement activity elsewhere.

127. Government notes the inherent trade-offs between volumes of cases opened and concluded, speed of decisions and quality of decisions. All other factors held equal, it is better to address harmful behaviour as quickly as possible to ensure the CMA's enforcement activity is efficient as can be and that disruption to business activity is minimised.

128. If the case concerns ongoing harm, lengthy delays in addressing a situation where parties are behaving in anticompetitive ways can lead to large amounts of consumer detriment or unfairly disadvantage rival firms, potentially causing some rivals or potential entrants to be forced out of the market. Some firms under investigation may have incentives to delay enforcement in an attempt to encourage the CMA to drop the case for prioritisation reasons. That said, the government also notes that the quality of decisions may be compromised if sufficient time is not allocated to gathering and scrutinising evidence, particularly in the context of complex cases.

129. These issues have been identified in three recent assessments of the enforcement system: by the CMA itself[22], the 2019 BEIS Competition Law Review[23], and independent reports by the Digital Competition Expert Panel[24] and by John Penrose MP[25].

Limitations to territorial scope

130. Recent trends in globalisation have increased the likelihood of anti-competitive agreements implemented outside of the UK which harm competition or consumers within the UK markets as these markets become more connected. This increase in the global connectivity of markets is evidenced by the UK KOF Globalisation Index, which increased from 77.22 to 89.31 from 1990 to 2019[26].

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[20] For instance, scale advantages such as the ability to reduce costs through making use of global supply chains, the value of established branding, or the accumulation of data. Recent technological advances may have increased the potential for scale advantages in certain markets, especially in digital markets. Autor et al (2019) *The Fall of the Labor Share and the Rise of Superstar Firms* describes a "superstar firm" model in which certain sectors, particularly where strong network effects are present, tend to reward the firms who are successful in taking advantage of technologies to become the most productive firms in their sector with large market shares.

[21] This includes all CA98 cases opened by the CMA from 2014/15 to 2020/21. This excludes cases started by the OFT.

[22] See letter from Rt Hon Lord Tyrie, Chairman of the CMA, to Secretary of State for BEIS, 21 February 2019

[23] BEIS (2019) Competition law review: post implementation review of statutory changes in the Enterprise and Regulatory Reform Act 2013.

[24] Furman et al (2019) Unlocking digital competition.

[25] Penrose (2021) Power to the People.

[26] Gygli, Savina, Florian Haelg, Niklas Potrafke and Jan-Egbert Sturm (2019): The KOF Globalisation Index – Revisited, *Review of International Organizations, 14(3), 543-574*

131. Meanwhile, the Chapter I prohibition applies only where the agreement - amongst other things - is "implemented, or intended to be implemented, in the UK". It therefore does not apply to agreements which restrict competition in the UK, has significant effects on trade within the UK, but could not be said to have been implemented in the UK. The Brexit Competition Law Working Group recommended amending section 2(3) CA98 to cover agreements that are "implemented, or that produce direct, substantial and foreseeable effects" in the UK.

Limitations to evidence gathering powers

132. Business practices across the economy are becoming increasingly digital, dynamic and highly dependent on the use of consumer and other data. Digitalisation has led to activities such as shopping, arranging travel and ordering food increasingly being undertaken online. From 2008 to 2020, the percentage of individuals reporting online shopping in the ONS' Internet Access Survey within the last 12 months increased from 53% to 87%[27].

133. Businesses of all sizes, as well as individuals, now routinely store information in electronic form on a "cloud", that is a web-based server not on the physical premises, but which is either elsewhere in the UK or outside the jurisdiction entirely but accessible from the premises. In 2021, 41% of EU enterprises used cloud computing, predominantly for email and storage files and an increase of 5% from 2020. A 2018 survey from the Cloud Industry Forum found that 89% of larger UK organisations use at least one cloud-based service[28]. Furthermore, the UK cloud market is forecast to be worth over £35bn by 2023, a 73% rise from its 2019 valuation[29]. Before the adoption of cloud-based technologies by businesses, and at the time CA98 was introduced, information would have likely been held in physical files or saved on a computer hard drive on the premises.

134. Existing on-site investigative powers enable the CMA to require the production of information stored in any electronic form which is accessible from the premises and which the investigation officer considers relates to any matter relevant to the investigation.

135. Given the increasing trend for cloud-based storage, government intends to strengthen the CMA's powers to require the production of electronic information stored remotely when executing a warrant under sections 28 and 28A of the Competition Act 1998. This will safeguard the CMA's ability to conduct its investigations effectively.

136. Existing law does not require parties under investigation co-operate with the filtering of cloud search outputs. These limitations in the law surrounding the CMA's powers to process documents stored remotely undermines the effectiveness of its investigations and its ability to carry out its statutory functions. The Law Commission addressed the desirability of amending the law to permit law enforcement agencies the powers to search for and copy remotely stored data when executing a warrant in their 2020 report[30]. The report stated, '*Remotely stored data must be accessed and copied by law enforcement agencies, in limited and regulated circumstances, when executing a search warrant for the legitimate aim of detecting, investigating and prosecuting crime.*'

137. Recent trends in digitalisation illustrate cloud storage is being increasingly adopted by businesses and consequently the problems outlined above will become more pronounced without amendments which clarify the law. Effective enforcement through CA98 depends on the CMA's ability to access high quality and timely evidence stored physically and digitally. Without this, and as digital technologies continue to be adopted

[27] Office for National Statistics (2020), Internet Access – households and individuals, table 8
[28] Cloud Industry Forum (2018). Cloud - The Next Generation. Cloud Industry Forum.
[29] Lewis, M. (2019). Cloud Computing 2020. Lexology Getting The Deal Through.
[30] Law Commission, Search warrants, Law Com No 396, 2020

by businesses, the CMA's ability to undertake its statutory duties are impaired and CA98 enforcement decisions may be sub-optimal at the expense of consumers and competition.

138. The CMA's 'seize and sift' powers refer to its powers to remove items from a business premises for the purpose of sifting or examination elsewhere when inspecting a premises under a warrant. This power under the CA98 is specified in the Criminal Justice and Police Act 2001 (CJPA). This allows the CMA to extract material from a premises where it would not be practical to decide on site whether it should be seized. This allows the CMA to sort through the evidence off the premises, returning any non-relevant evidence to its owner.

139. In contrast, powers regarding warrants to search domestic premises are not currently designated in the CJPA 2001. Therefore, the CMA cannot currently extract material from domestic premises where it is impractical to determine during an on-site inspection whether it should be seized.

A more proportionate framework for interim measures

140. During a CA98 case the CMA can take urgent action to prevent significant damage or to protect public interest. The CMA can do this through imposing interim measures, whereby the CMA requires a business to comply with temporary directions as to conduct, or suspend operation of the agreements, to avoid further harm. These can be imposed when the investigation has been started but not concluded and the CMA considers it necessary to act urgently either to prevent significant damage to a person or a category of persons or to protect the public interest. If a business under investigation fails to comply with the interim measures without reasonable excuse, the CMA can apply to court for an order to require compliance within a specified time limit.

141. Interim measures are a means to ensure anti-competitive conduct and its detrimental impacts do not persist during CA98 cases. Without the ability to take interim action, there is a risk that the harms from anticompetitive conduct continue before the CMA can reach a final decision on the conduct in question, which might frustrate the purpose of enforcement. Furthermore, there are safeguards in place to ensure these measures are used appropriately. As such, the CMA will seek to ensure that[31]:

    a. it imposes interim measures only where it has identified specific behaviour or conduct that it considers is causing or is likely to cause significant damage to a particular person or category of person, or is or is likely to be contrary to the public interest, and

    b. the interim measures sought prevent, limit or remedy the significant damage that the CMA has identified, and are proportionate for the purpose of preventing, limiting or remedying that significant damage.

142. There have been two instances of interim measures being imposed in CA98 cases[32].

143. Imposing interim measures can disrupt business activity and so imposes costs on a business subject to investigation, and if the investigation concludes without an infringement being established this will represent a cost to a business that was ultimately compliant with the law. However, in situations where interim measures are not imposed to address harmful conduct in scenarios where such conduct is subsequently found to be illegal, businesses and consumers may have suffered harms which would have been avoided had the law been complied with. The legislative framework for applying interim

[31] Guidance on the CMA's investigation procedures in CA98 cases: CMA8 (2022) - https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases

[32] London Metal Exchange and Atlantic Joint Business Agreement

measures should be proportionate. There should be effective mechanisms for businesses to challenge the CMA's decision (and therefore incentivise robust decision making, and guard against over-enforcement). At the same time, these mechanisms should not make a decision to impose interim measures so challenging as to risk under-enforcement.

144. Currently, addressees of the CMA's interim measure direction have the right to appeal them to the Competition Appeal Tribunal (CAT). As with final decisions in CA98 cases, interim measures are reviewed on the full merits of the case. In contrast, appeals against the CMA's substantive mergers and markets decisions are determined according to the principles of judicial review. In these appeals, the CMA's decision is scrutinised for a more limited range of public law failures in the decision, such as the decision being irrational or that the process for making the decision involved improper procedure. Full merits appeals are therefore intrinsically likely to involve a closer appraisal of the CMA's decision, involving narrower margins of discretion compared to judicial review.

145. Appeals are an important part of an effective framework for the application of interim measures. There is a risk that the CMA applies interim measures in circumstances that might ultimately prove unnecessary. The right to appeal against interim measures decisions serves the objective of protecting human rights and political freedoms as set out in the European Convention of Human Rights (ECHR). It also ensures that interventions in a business' conduct are justified.

146. At the same time, the framework for imposing and reviewing interim measures must be proportionate. If the framework is designed to avoid errors, without regard to the time and resources required to apply interim measures, there is a risk that interim measures are not applied when they would be warranted and serve an important public purpose. The current framework prioritises the prevention of interim measures being applied erroneously, without sufficient regard to the risk that interim measures are not applied when they are warranted.

Exemplary Damages

147. An infringement of Chapter I or II can lead to a damages action whereby a party claims that it has been harmed by the illegal conduct and makes a claim for damages. The private actions regime provides a layer of deterrence in conjunction with the public enforcement regime as defendants may have to reimburse claimants after being found to be in breach of Chapter I or II of CA98.

148. Until the Consumer Rights Act 2015 (CRA), exemplary damages were available as a remedy in competition damages cases, under common law principles. Exemplary damages could be awarded as an exceptional remedy aiming to deter and to punish the defendant for particularly egregious conduct, rather than the more usual claim which is to remedy a loss to the claimant. The CRA specifically excluded exemplary damages from collective proceedings for competition law damages, with the aim of mitigating the risk that collective proceedings gave rise to a US style litigation culture. Following the CRA, the EU Damages Directive[33] required that damages for breach of EU competition law "should not lead to overcompensation, whether by means of punitive, multiple or other damages". The EU Damages Directive was implemented in the UK through the 'Damages Directive Regulations 2017', which inserted Schedule 8A to the CA98 and made provision so that [34] a court or tribunal '*may not award exemplary damages in competition proceedings*.

[33] Directive 2014/104/EU of 26 November 2016.

[34] Claims in respect of loss or damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendments) Regulations 2017).

149. Following the UK's departure from the EU, government intends to return to the courts and CAT the discretion to award exemplary damages in competition law claims, depending on the particular features of the case. Government does not however intend to allow exemplary damages to be awarded in the case of collective proceedings; exemplary damages were prohibited in these cases before implementation of the EU Damages Directive and for separate reasons. Although an award of exemplary damages would only be expected in a limited set of cases, government considers that the possibility of exemplary damages should represent an additional deterrent for particularly egregious breaches of competition law. Further, outside of collective proceedings, government considers that there is no reason for the principles governing the award of damages for breaches of competition law to be different from those that apply for other tortious claims.

Policy objectives

150. The Government's objectives for reform of the CA98 enforcement system are to promote competition by increase the effectiveness of competition law enforcement:

i. Ensure the CMA can enforce against all illegal anti-competitive agreements which impact the UK
ii. Improve the quality of competition enforcement decision-making
iii. Improve the ability to address harm caused by anti-competitive behaviour

Policy Proposals

151. This impact assessment considers two options. A **preferred option**, introducing a package of amendments to CA98 to create an effective anti-competitive enforcement system, and a **do-nothing** option which acts as the business-as-usual counterfactual. These two options are described below.

152. **Preferred option -** this offers a suite of measures that can be grouped into three categories, Chapter I prohibition, information and evidence gathering, and remedies:

Chapter I Prohibition:

a) Amending the Competition Act prohibition on anti-competitive agreements to extend its territorial scope to include agreements which are implemented outside the UK, depending on the effects of the conduct within the UK.

Information and Evidence Gathering:

b) Widening the CMA's powers to require the production of electronic evidence stored remotely (i.e. 'from the cloud').

c) Widening the CMA's existing powers to require witness interviews in Competition Act investigations to enable it to require interviews of *any* person for the purposes of the investigation, and not just those individuals who have a connection to the particular business under investigation.

d) A new duty for any person (legal or natural) who knows or suspects that a CA98 investigation is being or is likely to be carried out, to preserve evidence which that person knows or suspects are or would be relevant to an ongoing or anticipated Competition Act investigation.

e) Granting the CMA 'seize and sift' powers when it exercises its existing powers under s.28A CA98 to conduct inspections of domestic premises under a warrant.

CA98 Remedies:

f) Amending the standard of review applicable in an appeal against a decision by the CMA's to make an interim measures direction.

g) Expanding the jurisdiction of the Competition Appeal Tribunal to include the ability to grant declaratory relief.

h) Returning to the courts a discretion to award exemplary damages in private competition law claims, except where the claim is made as part of a collective proceedings.

153. **Do-nothing** – this option leaves the competition enforcement framework as set out in CA98 unchanged and acts as the counterfactual to the preferred option.

Summary of the preferred option

154. The preferred option expands the territorial scope of the prohibition against anti-competitive agreements under CA98, so that it can apply to agreements which are not implemented in the UK, subject to the other conditions for an infringement being met, and depending on the effects in the UK. This ensures the UK competition law can protect competition and UK consumers in an increasingly globalised world.

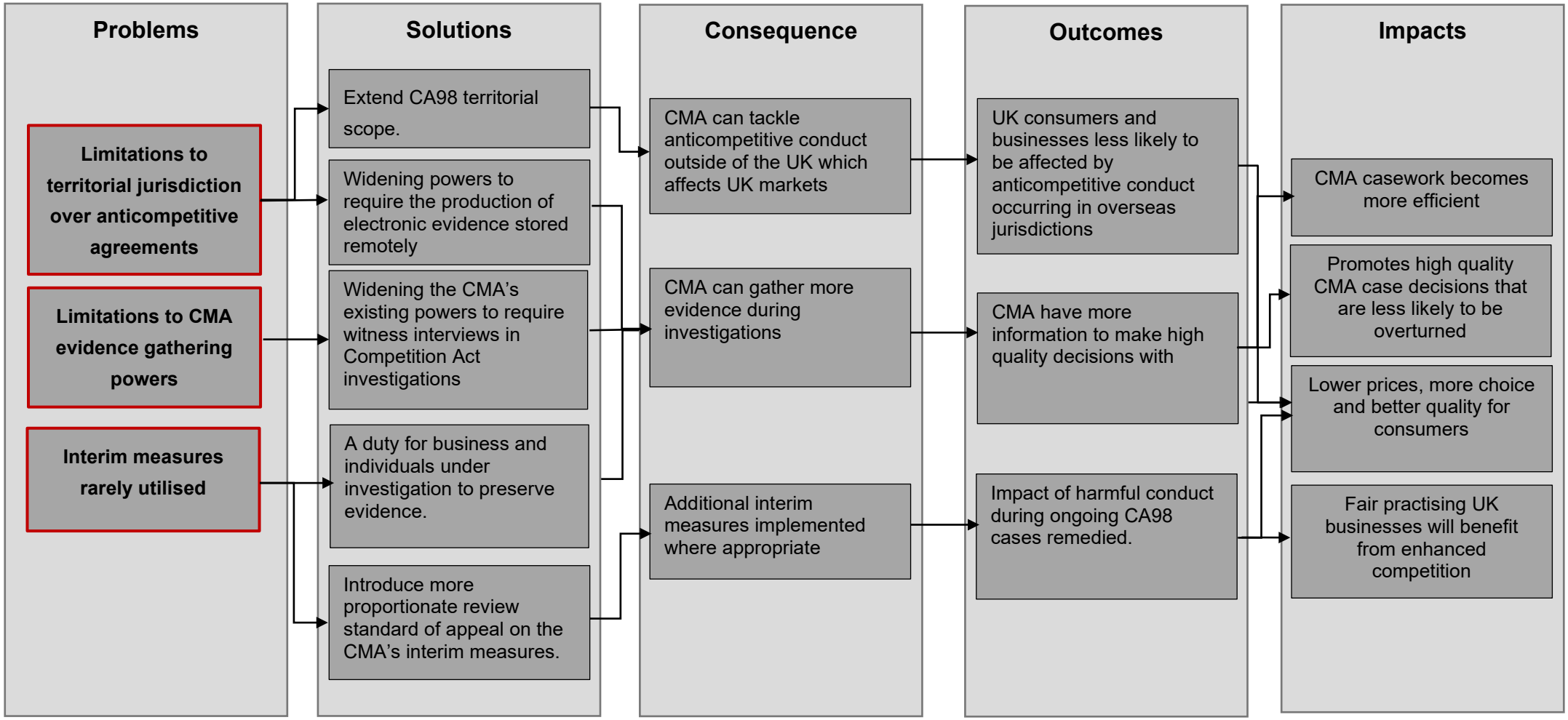
155. The preferred option also contains measures which establish an obligation on any person (legal or natural) to preserve evidence which that person knows or suspects is or might be relevant to a case and bolster the CMA's ability to gather evidence stored remotely during CA98 investigations. These powers are pivotal given that better access to information improves the quality and speed in which decisions in CA98 cases are made. Furthermore, ensuring evidence is preserved enables the CMA to draft information notices which minimise the scope for legal challenge as well as ensuring decisions are based on the best available evidence.

156. Furthermore, the proposal to move to a judicial review standard of appeal on CMA's interim measures over a full merits standard should encourage the use of interim measures in CA98 cases (which to date have not been applied frequently). Interim measures can help to prevent any harmful outcomes of potentially anti-competitive behaviour that might otherwise have persisted during the time-taken to complete a CA98 investigation. Moving to a system where appeals are determined by judicial review principles would retain business' ability to challenge the CMA's decisions that are irrational or made improperly, whilst allowing for a less intensive and more proportionate process for appeals.

157. The proposal repeals the ban on the Courts and the CAT awarding exemplary damages in CA98 cases where the defendant has been found to be in breach of Chapter I or II. The return of this discretion (except in collective proceedings) to the Courts and the CAT provides an additional deterrent against anti-competitive behaviour. Furthermore, this repeal brings the private actions regime largely back in line with the way it was before the implementation of the EU Damages directive into UK law.

158. Figure 3 below illustrates the intended mechanism of how the proposals set out in the preferred option resolve the issues highlighted above and achieve the stated objectives.

Figure 3 - Preferred Option Theory of Change



Cost-Benefit Analysis

159. Given that many of the proposals outlined in the preferred option amends or clarifies existing legislation, they are not expected to have a large impact on businesses, particularly since only a handful of businesses will be involved in CA98 cases. That said, for the measures where quantification is possible, government has conducted evidence gathering activities on the cost to business using a 'Standard Cost Model' approach.

160. Government has conducted surveys with industry to understand the business resource needed to comply with any additional procedures the amendments are expected to result in. This additional compliance cost to businesses is an opportunity cost as it represents time diverted away from profit generating business activity. Range estimates have been presented as in reality the compliance cost imposed on a business will vary on a case-by-case basis, and the way it will vary is inherently uncertain. The reported hourly resource has then been multiplied by wage tariffs reported in the Annual Survey of Hours and Earnings[1] (ASHE) and upscaled by a non-wage factor[2] to arrive at an estimated compliance cost of the activity. This activity cost is then multiplied by the number of times government anticipates it will be undertaken (and by how many businesses) to arrive at an aggregate cost impact on businesses.

161. Given that these changes concern the UK competition regime and aim to enhance competition through more effective enforcement against illegal anticompetitive conduct this section considers whether and where administrative exclusion D (pro-competition) applies. Proposals where the exclusion does apply mean the measure will be classified as a NQRP and therefore it's business impacts will not contribute to the BIT[3]. A regulation meets the pro-competition administrative exclusion if it satisfies the following criteria:

    a. The measure is expected to increase, either directly or indirectly, the number or range of sustainable suppliers; to strengthen the ability of suppliers to compete; or to increase suppliers' incentives to compete vigorously.

    b. The net impact of the measure is expected to be an increase in [effective] competition (i.e. if a policy fulfils one of the criteria at (a) but results in a weakened position against another) and the overall result is to improve competition.

    c. Promoting competition is a core purpose of the measure.

    d. It is reasonable to expect a net social benefit from the measure (i.e. benefits to outweigh costs), even where all the impacts may not be monetised.

162. The following paragraphs consider the reforms against these criteria. The most likely direct, pro-competition effect would be a better ability to compete on fair terms due to improved enforcement against illegal anticompetitive conduct as well as further incentive to avoid partaking in such conduct. As per Figure 3, the changes will extend the territorial extent of the CMA's CA98 jurisdiction, improve their evidence gathering powers and encourage the use of interim measures in some cases. This in turn should increase business compliance because poor practices will be identified and addressed more effectively through stronger evidence gathering powers. This also means that fair practicing businesses would find it easier to compete due to a more level playing field where remedial action takes place. Fairer conditions as a result of more effective antitrust

[1] Annual Survey of Hours and Earnings: 2021 provisional results. Table 14.6a Hourly pay - Excluding overtime (£) - For all employee jobs: United Kingdom, 2020.
[2] Derived from Eurostat data on wages and non-wage labour costs https://ec.europa.eu/eurostat/statistics-explained/index.php/Hourly_labour_costs#Non-wage_costs_highest_in_France_and_Sweden
[3] https://www.gov.uk/government/publications/better-regulation-framework

enforcement may also indirectly promote the number or range of sustainable suppliers in some cases.

163. All the preferred option's components are expected to have a positive impact on competition, through different mechanisms, and none is expected to dampen competition. In combination with the considerations from the previous paragraph, the net impact of the proposals is expected to be an increase in competition.

164. Finally, it is reasonable to expect a net societal benefit of the changes from positive impacts on product price, quality, choice, and innovation (para. 206). While these positive impacts of an enhanced antitrust regime could not be quantified due to a lack of robust data, available evidence suggests that these benefits would likely outweigh any costs placed on businesses due to the wide-reaching impact they would have on a range of consumers. Therefore, it is reasonable to expect a net social benefit from the reforms.

165. In conclusion, any quantified impacts on businesses of these measures meet the criteria for the pro-competition exemption and thus are classified as NQRPs where the associated business costs will not be factored into the BIT score.

166. None of the measures are expected to impose costs on consumers. CA98 investigations concern the conduct of businesses and therefore the proposals will not directly affect consumers. Where the proposed measures are expected to promote competitive outcomes the expected indirect benefits to consumers have been assessed qualitatively.

167. Where quantification has not been completed given a lack of available evidence on how some of the smaller changes to existing processes may impact businesses, a qualitative description has been provided justifying the approach taken and describing the impact the measure will have. This is considered a proportionate approach given this appraisal concerns several subtle amendments which are not expected to have a large impact and lack sufficient empirical evidence to quantify robustly.

168. **All presented cost estimates are in £2021 prices unless stated otherwise.**

Chapter I Prohibition:

Amending the Competition Act prohibition on anti-competitive agreements to extend its territorial scope.

169. Under the existing legislation, an agreement implemented outside the UK, but which produces effects within it would not be captured by Chapter I CA98. This results in a weakness in the enforcement system in cases where an agreement implemented outside of the UK nevertheless restricts UK competition and causes direct harm to UK consumers.

170. Pursuing this amendment may impose additional costs on UK businesses who have implemented anti-competitive agreements outside of the UK and now fall into scope of the Chapter I prohibition. However, it is expected that this will impact very few UK businesses relative to the UK business population and will capture predominantly non-UK businesses whose activity affects UK markets.

171. This proposal will deliver benefits to UK consumers and businesses where anti-competitive effects caused by agreements implemented outside of the UK will be subject to enforcement action because of this amendment to territorial scope.

172. **Overall, this measure is expected to introduce an administrative cost on a small number of UK businesses,** however some of these businesses may be found to have undertaken illegal activity. The proposal will also deliver benefits to UK consumers and businesses where competition concerns are addressed through enforcement.

173. In line with Better Regulation guidance, costs to non-UK businesses have not been assessed.

Information and Evidence Gathering:

Widening the CMA's powers to require the production of electronic evidence stored remotely (i.e. 'from the cloud').

174. The proposals outlined in the preferred option can partially be exercised through existing powers under CA98. These include the existing on-site investigative powers outlined in sections 27, 28 and 28A. However, the powers to require production which can be exercised during an inspection can be widened to ensure that the CMA is able to access all of the material that it needs which is accessible from the premises but held remotely. This is to ensure the CMA's powers are effective in relation to access to evidence in the cloud to safeguard the CMA's ability to conduct its investigations in an increasingly digitalised world.

175. **This reform extends existing law and does not make any large amendments which will fundamentally change the way CMA investigations are conducted, or the obligations they place on businesses**. Cloud technologies are widely adopted and accessing information in this way is typically no more costly than retrieving data from a physical hard drive. **Considering this, this proposal has been deemed not to introduce any additional costs to businesses.** Furthermore, benefits may accrue where evidence gathered in this manner leads to the quicker conclusion of investigations offering certainty to businesses earlier. Improved evidence gathered during an investigation leads to better market outcomes from CMA competition case decisions. Where anti-competitive outcomes are addressed, improved competition levels will benefit both consumers and businesses.

Widening the CMA's existing powers to enable it to require interviews of *any* person for the purposes of the investigation, and not just those individuals who have a connection to the particular business under investigation

176. In CA98 cases, the CMA has the power to require individuals to answer questions at an interview only if they have a connection to a business under investigation, and so relies on voluntary attendance by individuals without such a connection. Such individuals without a 'connection' could be an employee of a customer, supplier or competitor of a business under investigation; who could hold information relevant for the purposes of the investigation, but may be reluctant to voluntarily answer CMA questions.

177. In the merger control and markets context, the power to require interviews is broader; the CMA can require an interview from 'any person' regardless of their connection to the merging parties. The proposal here would broaden the power to interview individuals as part of CA98 cases, so it aligns with the existing powers in merger and market investigations.

178. This would improve the CMA's ability to gather evidence, potentially facilitating faster and more effective decision-making, but it would bring more people within scope of being required to attend an interview. Penalties can be applied if a person fails, without reasonable excuse, to comply with a notice to answer CMA questions at interview. There can also be legal costs associated with examining evidence and preparing witnesses for the interview. There could therefore, be some additional cost to businesses other than the business under investigation if their employees are requested to be interviewed under the use of this power.

179. Following evidence gathered from surveys conducted with industry stakeholders, government has estimated that, on average, an additional interview will impose an **additional £3,000 to £6,000 of internal business administration costs** as well as **£26,000 to £48,000 of external legal advice costs** in examining evidence and preparing for an interview. Under these assumptions, **the total opportunity cost to business per witness interview is estimated to be between approximately £29,000 to £54,000.**

180. Table 3 below contains the assumed resource breakdown formulated using evidence gathered from surveys with industry stakeholders.

Table 3 - Estimated additional business cost per interview

Occupation	Hourly cost of labour (£)	Hours of time diverted from business activity		Total labour cost (£)	
		Low	High	Low	High
Corporate managers and directors	37.62	30	60	1,100	2,300
Internal Legal professional	44.15	27	67	1,200	2,900
Administrative occupations: office managers and supervisors	22.64	11	22	300	500
Administrative occupations: records	17.03	20	40	300	700
External Legal	512.00	50	93	25,600	47,800
Total (rounded to £1000s)				**29,000**	**54,000**

181. Across the calendar years from 2014 to 2020, 50 CA98 cases were opened at an average of just over 7 cases per year. This included two years in which there were an unusually high number of new investigations opened. Therefore, it is assumed that there are **6 new CA98 investigations per year.**

182. Many third-party witnesses that are interviewed by the CMA (for instance in merger investigations) are happy to do so on a voluntary basis, so it is not clear that there would be a significant number of compulsory interviews resulting from this additional power. However, the assumption used here is that **each case would result in an additional 2 persons being interviewed** directly because of this proposal, leading **to 12 additional interviews per year**. These assumptions are based on CMA expert advice.

183. At a cost of £29,000 to £54,000 per interview, an additional 12 interviews are estimated to impose **an annual cost to business of between £0.35m to £0.65m**.

184. **This measure is not expected to introduce any costs on consumers as they are not directly impacted by the proposal**. Where additional interviews provide evidence which facilitates higher quality and quicker decision making, pro-competitive outcomes will be delivered sooner, offering benefits to both consumers and businesses.

A new duty for business and individuals under investigation to preserve evidence relevant to an ongoing or anticipated Competition Act investigation.

185. Currently businesses under investigation in relation to CA98 matters are only required to preserve evidence where the obligation arises indirectly because of the issue of an information gathering notice or other investigative measure. The obligation to preserve

documents only arises indirectly where the CMA exercises its investigatory powers in respect of which non-compliance could be an offence under s.43 CA98.

186. Parties would need to ensure that data is preserved on servers so there may be some additional cost to record keeping or IT staff. There may also be a familiarisation cost with the obligation to preserve evidence, undertaken at the point of which a business was notified of becoming under investigation. The additional burden may be limited as well-advised parties may expect to preserve material in any case when they know they are under investigation.

187. Following evidence gathered from surveys conducted with industry stakeholders, government has estimated that, on average, a further requirement for business to preserve more evidence will impose an additional **£2,000 to £3,900 of internal business administration costs** as well as **£4,400 to £8,700 of external legal advice costs** in examining evidence provided per business. Under these assumptions, the total opportunity cost to an affected business is estimated to be between **£6,000 to £13,000**.

188. Table 4 below contains the assumed resource breakdown formulated using evidence gathered from surveys with industry stakeholders.

Table 4 - Estimated additional cost to preserve evidence per business

Occupation	Hourly cost of labour (£)	Hours of time diverted from business activity		Total labour cost (£)	
		Low	High	Low	High
Corporate managers and directors	37.62	6	11	200	400
Internal Legal professional	44.15	14	27	600	1,200
Administrative occupations: office managers and supervisors	22.64	14	27	300	600
Administrative occupations: records	17.03	50	100	900	1,700
External Legal	512.00	9	17	4,400	8,700
Total (rounded to £1000s)				**6,000**	**13,000**

189. As with the assumptions around wider powers to interview relevant witnesses, there are assumed to be **6 new CA98 investigations** per year. CA98 cases typically involve multiple parties especially in cases related to suspected anticompetitive agreements, based on CMA advice there are assumed to be **5 businesses per investigation** subject to the new requirements around preserving evidence. **30 additional businesses per year** will therefore incur the costs. Although some businesses would preserve evidence in the absence of this measure it is assumed that all businesses must undergo additional preservation activity in the interest of not underestimating costs. This leads to an **aggregate cost estimate in the range of £0.18m to £0.39m on businesses**.

190. **This measure is not expected to introduce any costs on consumers as they are not directly impacted by additional interviews**. Where preserved evidence facilitates higher quality and quicker decision making pro-competitive outcomes will be delivered sooner, offering benefits to consumers and businesses.

Granting the CMA 'seize and sift' powers when it exercises its existing powers to conduct inspections of domestic premises under a warrant.

191. Enabling the CMA to seize and sift through information when conducting inspections of domestic premises will bolster the quality of its decisions in instances where they cannot reasonably determine whether evidence is relevant to a case on site. This will deliver benefits relative to instances where the CMA did not have the power to seize the evidence and therefore were unable to inform case decisions with potentially relevant information. Better quality decisions ensure the right outcomes for antitrust cases are delivered which benefits consumers and fair practicing businesses through fairer and better functioning markets.

192. This measure may introduce some additional costs through additional administrative burden which arises from any information seized on domestic premises. Government expects that this additional cost will be insignificant relative to the existing administrative burdens of undergoing an investigation, particularly as the CMA currently have the power to seize evidence from non-domestic premises. Therefore, this proposal does not raise affordability concerns around the additional costs imposed. Furthermore, only a limited number of businesses will be involved in CA98 cases on an annual basis which means the overall cost impact on UK businesses will be negligible.

193. In cases where seized evidence informs, and potentially quickens, the CMA's casework greater certainty will be granted to the involved parties and therefore there is some scope for this measure to introduce efficiency benefits to businesses under investigation. These case efficiency gains will likely be limited however given that the CMA will build their cases on a range of evidence from various sources.

194. This measure is not expected to introduce any additional costs on consumers as only parties under investigation will be subject to the seizure of evidence from domestic premises. Consumers are expected to benefit from pro-competitive outcomes in instances where domestically seized evidence informs casework around businesses who are ultimately found to be in breach of competition law.

195. Overall, Government expects that the benefits of this measure will exceed any additional costs introduced on businesses given the scope for enhanced CMA decision making to bring pro-competitive outcomes to markets.

CA98 Remedies:

Amending the standard of review applicable in an appeal against a decision by the CMA's to make an interim measures direction.

196. The lack of interim measures introduced to date suggests that the current appeal standard may be disproportionately lenient and has restrained their use. Through introducing a more proportionate standard of review, interim measures may be utilised more by the CMA under the appropriate circumstances. This could lead to unnecessary burdens if it results in interim measures being erroneously applied. However, it will remain the case that the CMA can apply interim measures only where specific statutory conditions are met, and it will remain accountable through a right of businesses to appeal these decisions to an independent judicial body. Where it is ultimately found that the conduct prevented by additional interim measures (following the amendment in review standard) represented a breach of CA98, interim measures will deliver benefits to consumers and rival businesses who would have been subject to the adverse consequences of the identified anti-competitive practices.

197. **This measure is not expected to introduce additional costs on businesses given that the CMA already has the power to impose interim measures during CA98 cases.** It is expected that where interim measures are imposed benefits will be delivered to consumers at no cost through the removal of anti-competitive practices. Rival businesses conducting activity in a competitive manner will also benefit from increased competition levels in a market following the use of an interim measure.

Expanding the jurisdiction of the Competition Appeal Tribunal (CAT) to include the ability to grant declaratory relief.

198. In private competition law claims, the CAT can deliver relief to claimants through awards of damages, 'any other claim for a sum of money' and injunctions (but not an interdict in Scotland). The CAT cannot currently offer relief in the form of a declaration, a power which the courts have, including in relation to competition claims. A declaration is a legally binding statement on the application of law to a set of facts. For example, declaratory relief may take the form of a declaration by a court that an agreement or certain clause in an agreement breaches competition law and therefore cannot be enforced.

199. Damages, injunctions and declaratory relief may be awarded individually or in conjunction with one another, making these court outcomes an effective way to offer relief to claimants in private competition cases. And in some cases, a declaration may be a more appropriate and practical remedy than an award for damages.

200. The absence of the ability for the CAT to grant declaratory relief means that parties who are seeking declaratory relief as a remedy are confined to the courts for their competition claims. This may not be ideal as the CAT is the specialist competition tribunal, and requests for declaratory judgments in the High Court are often delayed as the hearing Judge takes advice on the applicable competition law. It also reduces the viability of the CAT as the main forum for competition litigation.

201. Expanding the jurisdiction of the CAT to include the ability to grant declaratory relief offers a valuable remedy to settle disputes relating to competition law through offering legally binding statements on the application of competition law to a set of facts. It will provide parties with certainty as regards their legal position at an earlier point than if they had to apply to the High Court. This is especially important in situations in which the claimant is not yet able to quantify the damages incurred but seeks certainty as regards their legal position to inform their business practices. Additionally, declaratory relief can be a particularly important remedy in collective actions, as it can assist with calculating damages and providing class members with a practical remedy. Furthermore, the award of declaratory relief could provide useful precedent for future decisions. This will not impose any costs directly on businesses and will increase the efficiency of the UK competition regime to provide redress for consumers and businesses; whilst enhancing the attractiveness of the UK as a venue for the resolution of international disputes.

202. In cases where the claim is settled sooner, this will save time and reduce the costs of court proceedings to involved parties. In cases where claimants are awarded declaratory relief and the defendant is another business, any impact the defendant may experience arises from their breach of competition law and is not attributable to the new power. This impact is unlikely to directly impact consumers as private competition claims tend to be raised by and against businesses. That said, declarations will promote pro-competitive outcomes which may offer benefits to consumers through elements such as lower prices and improved quality, and by acting as an additional deterrent to future anti-competitive conducts.

Returning to the courts a discretion to award exemplary damages in private competition law claims, except where the claim is made as part of a collective proceedings.

203. This proposal imposes no additional costs on the Exchequer as it returns the discretion to award exemplary damages in competition claims to courts and the CAT per established common law principles, and without necessitating the creation of a separate statutory framework. Businesses who must pay damages to claimants have ultimately been in breach of competition law and therefore the cost of awarding the redress is not attributable to the proposal. The proposal does not directly affect consumers and therefore imposes no cost on this group. Benefits will be delivered to consumers in the form of financial awards where they are successful in a claim for exemplary damages (if sought on an individual rather than collective basis, where exemplary damages will remain unavailable), however historic cases involving exemplary damages suggest that claimants will likely be other businesses who have been harmed by anti-competitive conduct.

204. Whilst this proposal is expected to impose no costs on bona fide businesses or consumers, it will deliver benefits through the deterrence effect it is expected to have on anti-competitive conduct. The private actions regime provides an additional layer of deterrence in conjunction with the public enforcement regime and repealing the ban on the courts and CAT to award exemplary damages in competition cases increases the potential financial penalty associated with particularly egregious conduct. Enhancements in competition arising from this bolstered deterrence effect will deliver benefits to both consumers and businesses as distortions and barriers created by anti-competitive conduct are avoided.

205. Furthermore, this proposal offers an additional route for redress in circumstances where claimants may have been particularly impacted by anticompetitive conduct. Redress will bring indirect benefits to markets where claimants receive compensation, albeit likely small given that only a handful of parties are involved in competition cases.

Total impact

206. Overall, the package of CA98 measures is expected to deliver significant benefits through strengthened CA98 investigations. These benefits are delivered through the extension of territorial scope, clarified information gathering powers and a more proportionate framework for the CMA to implement interim measures, all of which promote competitive market outcomes. Where anti-competitive conduct is tackled sooner, and case outcomes are based on better evidence, benefits will be delivered to both consumers and bona fide businesses.

207. Furthermore, the reforms also enhance the available avenues for redress in CA98 cases through returning the power to award exemplary damages to the courts in private competition law claims and allowing the CAT to grant declaratory relief. These reforms offer additional practical avenues to achieve redress to consumers and businesses and will improve the efficiency of the UK's competition regime.

208. Given that the amendments proposed to CA98 do not significantly change existing processes, and in some cases extend the law, the package of measures is not expected to impose large costs on the relatively small number of businesses involved in CA98 cases on a yearly basis.

209. Where quantification of costs to business has been conducted, the measures are expected to result in an annual cost to business of £0.5m to £1.0m (£2021 prices).

210. The central estimate has an associated **EANDCB of £0.7m.** As discussed, **this EANDCB relates entirely to non-qualifying regulatory provisions** (pro-competition measures) and so **the BIT score of these changes is £0.**

211. A significant portion of the expected costs remain unquantified due to a lack of robust evidence to base assumptions on and therefore do not contribute to the presented EANDCB. These costs have been assessed qualitatively. Furthermore, many of the benefits to businesses arising from more effective antitrust enforcement also remain unquantified. This approach towards assessing costs has been deemed appropriate considering the scope for the unquantified costs and benefits to offset one another.

Public sector equality duty

212. The impact of the reforms on the protected characteristics will depend on the number and nature of the CA98 cases that the CMA will undertake with these changes, compared to its expected activity under current arrangements.

213. As the proposed reforms do not drastically deviate from the status quo, the type and number of cases the CMA takes on is unlikely to change as a result. That said, consumer vulnerability will likely be softened as a result of improved enforcement against illegal anti-competitive conduct. Consumer vulnerability overlaps with protected characteristics in areas such as age and health & disability, though the concepts differ on the other characteristics. Examples of the CMA's recent CA98 cases include 'Hand sanitiser products: suspected excessive and unfair pricing'[4] and 'Hydrocortisone tablets: alleged excessive and unfair pricing, anti-competitive agreements and abusive conduct'[5]. These cases demonstrate the potential the CMA's investigations into suspected illegal anti-competitive conduct has, to benefit particular consumer groups who are users of certain products or services.

214. In line with PSED impact assessment guidance, government has considered whether the reforms to CA98 will eliminate unlawful discrimination, advance equality of opportunity or foster good relations between people who share protected characteristics. In these regards, it is not expected that any direct impacts or issues will arise as the measures do not actively discriminate against any of the protected characteristics or other consumer groups. Although new CA98 investigations decisions may impact specific consumer groups, the reforms are anticipated to benefit consumers more broadly through addressing any identified illegal anti-competitive conduct which may be causing consumer detriment (e.g., higher prices or less choice). Furthermore, the reforms are not expected to affect the types and number of CA98 cases which the CMA take on in a manner which would impact the protected characteristics more or less than the status quo. Moreover, it is expected that strengthening CA98 will indirectly benefit the protected characteristics alongside all other consumers.

215. **The matters considered in this Impact Assessment do not raise any issues relevant to the public sector equality duty under section 149(1) Equality Act 2010 because the policy does not discriminate or unjustly favour any person or group of people based on their protected characteristics. Therefore, considering these considerations, government will proceed with the reforms as planned.**

Impact on small and micro businesses

216. The reforms proposed in this IA are not expected to change the types or number of businesses which are involved in the CMA's enforcement of CA98. Therefore, government does not expect to see an adverse impact on small or micro sized businesses relative to the status quo as a result of the reforms. Furthermore, penalties will only be issued to businesses who have ultimately been found to be in breach of the law, though there will be costs placed on businesses to comply with investigation

[4] https://www.gov.uk/cma-cases/hand-sanitiser-products-suspected-excessive-and-unfair-pricing
[5] https://www.gov.uk/cma-cases/hydrocortisone-tablets-alleged-excessive-and-unfair-pricing-anti-competitive-agreements-and-abusive-conduct-50277

procedures. More generally, an assessment of why small and micro sized businesses are not exempt from the scope of CA98 is included below.

217. The CMA will undertake investigations into suspected illegal anti-competitive conduct based on complaints received. Typically, the suspected anti-competitive conduct the CMA investigates involves larger businesses as these are the sorts of businesses who have the market share to benefit from and facilitate activities such as collusion, price fixing or cartel activity. The deterrence effect of the CMA's enforcement in this space is also regarded as significant[6], adding to the incentive for the CMA to tackle the most harmful suspected anti-competitive agreements. Recent examples of CA98 cases include anti-competitive conduct by Google[7] (opened June 2022), suspected anti-competitive conduct by Google in ad tech[8] (opened May 2022) and suspected anti-competitive conduct in connection with the procurements for contracts to supply services at Heathrow and Derwentside Immigration Removal Centres[9] (opened March 2022).

218. Although the CMA's CA98 investigations tend to involve larger businesses, it is possible that the CMA may investigate a small or micro sized business to resolve illegal anti-competitive behaviour occurring at a local level. There are significant benefits associated with these investigations due to the deterrence signal it creates across the UK. A recent example includes an investigation into privately funded ophthalmology services[10], this case found parties infringed the Chapter I prohibition by entering into agreements and/or concerted practices to fix initial Ophthalmologist consultation fees in a hospital. This case involved individually listed Ophthalmologists being issued financial penalties.

219. Given the importance of ensuring the CMA can tackle illegal anti-competitive agreements at the local level, it has been decided not to exempt small or micro sized businesses. That said, it is expected that this would only impact a negligible proportion of the UK's small and micro size business population, with the only businesses being investigated being those suspected of breaching competition law. Given the severity of this conduct, exemptions and mitigations from investigation would not be appropriate due to the adverse impact it could have on the CMA's ability to identify and remediate anti-competitive conduct.

220. Furthermore, it is anticipated that the wider small and micro business population would benefit from these proposals which will allow the CMA to more effectively identify illegal anti-competitive conduct. One of the groups likely to suffer as a result of any illegal anti-competitive conduct are small or micro sized businesses. In this sense, an exemption from investigation for this group may do more harm than good to the overall small business population. Increases in competition from the removal of this type of conduct would benefit small and micro sized businesses through effectively creating a more level playing field with offending businesses. Therefore, it is not anticipated that these reforms will adversely affect small or micro sized businesses and consequently an exemption from investigation has been deemed inappropriate. In light of this, no viable mitigating factors were identified, nor have they been deemed necessary.

[6] https://www.gov.uk/government/publications/evaluation-of-direct-impact-and-deterrent-effect-of-ca98-cases
[7] https://www.gov.uk/cma-cases/investigation-into-suspected-anti-competitive-conduct-by-google
[8] https://www.gov.uk/cma-cases/investigation-into-suspected-anti-competitive-conduct-by-google-in-ad-tech
[9] https://www.gov.uk/cma-cases/suspected-anti-competitive-conduct-in-connection-with-the-procurements-for-contracts-to-supply-services-at-heathrow-and-derwentside-immigration-removal-centres
[10] https://www.gov.uk/cma-cases/privately-funded-healthcare-services

Wider consumer policy reforms

Strengthening consumer enforcement powers

221. In this section, we cover the package of reforms to the civil enforcement of consumer protection law that includes two separate but overlapping strands, i.e.:

    a. new powers for the civil courts to impose a monetary penalty:

        i. where the court finds there has been any non-compliance with an information notice[11] sent by a consumer enforcer without reasonable excuse,

        ii. where the court finds that an undertaking given to the court has been breached,[12]

        iii. where the court finds that an undertaking given to any enforcer with powers to enforce consumer protection law to protect the collective interests of consumers has been breached without reasonable excuse[13],

        iv. where the court finds that the enforcement subject has engaged in or is engaging in conduct breaching consumer protection laws in scope of the court-based enforcement mechanism.

    b. new powers for the Competition and Markets Authority (CMA) to directly enforce a subset of the legislation within scope of the court-based enforcement mechanism (the "CMA administrative model"), including the power to impose a monetary penalty in (generally) the same circumstances as the civil courts as described above.

222. Given that the reforms to the CMA's powers encompass both reform strands, this section focuses on the impacts of the reforms on the CMA's processes. We did not have sufficient evidence to assess the impact of new powers for civil courts in relation to other enforcers.

223. Throughout this section, we refer to the CMA's activities to investigate and enforce consumer protection law to protect the collective interests of consumers as a 'case', i.e. as a single programme of work at the CMA to address consumer harm. One 'case' may involve enforcement action against multiple businesses and the outcome may differ between firms. For instance, some may agree to stop the business practice through an undertaking, while for others the CMA may need to go to court or, under the reform proposals, the CMA may reach a settlement with, or impose an infringement decision on, the party.

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[11] Consumer enforcers already have the power under Schedule 5 of the Consumer Rights Act (CRA) 2015 to request information by notice.

[12] Breach of an undertaking given to the court is currently actionable as a contempt of court. The Bill will empower the court to impose civil monetary penalties for non-compliance with an undertaking it has accepted applying the civil standard of proof.

[13] Part 8 of the Enterprise Act 2002 provides a court-based mechanism for the enforcement of consumer protection laws to protect the collective interests of consumers. The Bill will repeal, replace and enhance this regime, as described above.

Policy problem

224. UK consumer law includes important protections for consumers on what they can expect when purchasing goods, services and digital content and what their rights are if things go wrong. Where consumer protection law is not enforced effectively on consumers' behalf:

    a. consumers may lose out and may lack confidence to exercise consumption choices and decisions,

    b. unscrupulous traders may gain an unfair competitive advantage over compliant traders.

225. There is thus a strong societal interest in achieving compliance, and deterring non-compliance, with consumer protection law.

226. While in general consumer law gives each consumer powers to enforce his or her rights, much of its enforcement is done by public bodies. The CMA and other enforcers such as sector regulators (e.g. Ofgem, the Civil Aviation Authority etc.) and local authority trading standards services (LATSS) take on such public enforcement of consumer law on behalf of all consumers.

227. However, there have been several instances where public enforcement action could progress only slowly and with high resource cost, such as the CMA's enforcement actions against gambling businesses, secondary ticketing platforms, and anti-virus software providers. Further, a 2006 OECD report on the effectiveness of consumer law enforcement regime concluded that the UK's enforcement model may provide insufficient deterrence.[14]

228. In trying to understand the causes of low compliance, the OECD report used a simple model of deterrence: a firm's likelihood of complying with the law is a function of the size and certainty of a penalty, where higher or more certain penalties suggest increased likelihood of compliance. The report found that the existing model of consumer law enforcement in the UK carries low 'penalties' in the form of defence costs and bad publicity, and zero direct financial penalty for breaches of consumer protection law or for non-compliance with the enforcement process. Weak business compliance incentives and systemic inefficiencies have manifested themselves in different ways and points during enforcement cases:

- **Delays during the investigation stage**. The investigation periods of cases are lengthy and often made longer due to delays stemming from non-cooperation with information requests. No direct monetary penalty exists to deter business from this behaviour, so enforcers must currently go through a court to enforce compliance in such cases.[15]
- **Non-compliance with undertakings**. No direct penalty currently exists to deter businesses from breaching agreed undertakings given to enforcers. Traders can thus enter into agreements with the enforcers or the court with a spurious intent to end, or not to carry out, harmful practices. In principle, traders may then fail to comply with

[14] OECD, Best practices for consumer policy: Report on the effectiveness of enforcement regimes, 2006.

[15] For additional details on the anti-virus enforcement case, see CMA case page Anti-virus software. The CMA considered one company to have not fully implied with its information request, although this was disputed by the company in question.

the undertaking they have given and for the period of non-compliance traders could continue to cause unnecessary detriment to affected consumers (e.g. by continuing practices they had agreed to desist and/or failing to give or delaying redress included in undertakings), and/or harm competitors through an unfair market advantage.

- **Breaches of consumer protection law**. No direct penalty exists to deter businesses from breaching consumer protection law. This means that at worst they will be required by the court to comply or, for breaches of the law causing a defined loss to consumers, to compensate those who have lost out, but they can enjoy a competitive advantage or cause harm to consumers that is difficult to quantify for their own gain without any risk of being fined.
- **Lengthy court-based enforcement by the CMA**. The current public enforcement regime requires the CMA to go to court at all stages of its consumer enforcement process if traders are unwilling to comply. This can include gathering evidence by requesting information, accepting or enforcing undertakings, seeking to end infringements, or even to enforce an order that has been granted by the court. Taking civil cases to court is lengthy, complex and costly and in general the CMA has to bear its own costs of bringing proceedings, which is ultimately a taxpayer-funded cost. Further, if the CMA's applications to court for an enforcement order are refused, then it will be at risk of being ordered to pay some or all of the trader's legal costs.

229. These challenges are illustrated in the case study below. While this was one of the more protracted enforcement cases, the CMA have encountered similar challenges in several other cases. The enforcement case study involved alleged breaches of consumer legislation by a secondary ticketing platform.

Case study: CMA enforcement against secondary ticketing traders[16]

- In **2015**, four secondary ticketing platforms formally agreed with the CMA to give improved information to buyers about the tickets listed on their sites.
- In **2016**, the CMA reviewed whether these four platforms were providing adequate information to consumers, in line with the agreements earlier reached with the CMA, and their legal obligations.
- In **November 2017**, the CMA decided to take enforcement action against several of these platforms, on the basis of suspected breaches of consumer protection law.
- In **April 2018**, three of the secondary ticketing platforms agreed to change their practices as considered necessary by the CMA. The fourth platform did not agree to make the changes sought by the CMA.
- In **August 2018**, the CMA began court proceedings under Part 8 of the Enterprise Act 2002, for suspected breaches of consumer protection law, against the fourth platform.
- In **November 2018**, the court made an enforcement order under Part 8 requiring the platform to change its practices.
- In **January 2019**, having carried out a review of the practices of the fourth platform, the CMA considered that these practices were not fully compliant with the court order. The CMA raised these concerns with the platform.

[16] https://www.gov.uk/cma-cases/secondary-ticketing-websites

- In **March 2019**, the CMA warned the platform that, although some improvements had been made, in the CMA's view the platform's practices were still not fully compliant with the court order.
- In **July 2019**, the court declared, on application from the platform, that some but not all of the platform's practices were compliant with the court order.
- In **September 2019**, the CMA suspended its preparations for contempt of court proceedings against the platform after the platform addressed the CMA's remaining outstanding concerns, nearly 4 years after the formal agreements with secondary ticketing platforms were reached with the CMA.

Rationale for intervention

230. The rationale for government intervention is to address a pre-existing market failure more effectively than the existing government intervention does.

231. The market failures and rationale for government intervention to introduce these measures are the same as those that motivate the existence of public enforcement bodies: **information asymmetries** between consumers and traders and the **incentive structure** of private consumer law enforcement. The former is a significant reason why consumers experience problems, while the latter influences why they cannot solve these problems by themselves.

232. Traders generally control, in particular, the content and presentation of the "offer" made to the consumer – for example, the description of a product's features, advantages or price that the consumer sees and considers before deciding whether to make the decision to purchase. In addition, traders generally know more than consumers about the quality of the goods, services and digital content that they sell and about the terms and conditions governing the purchase. Lack of clear or adequate information can lead to consumers making purchasing decisions or other transactional decisions they would not have made if they had had access to all information at the relevant time.

233. Where consumers become aware of a potential breach of their statutory or other rights, individual consumers' incentives to seek recourse may be low. Many consumers may compare the time and cost to pursue a claim, together with the likelihood of success, with the dispute value and conclude that seeking redress is not worthwhile. Businesses thus face relatively few challenges by consumers compared to the number of detrimental experiences and, absent a system for public enforcement of consumer protection law, might have a low extrinsic incentive to comply with consumer law.[17] Public enforcement of consumer law is therefore needed to encourage compliance. Public enforcement has the characteristics of a **public good** in that it is non-rivalrous (consumer A benefitting from public enforcement does not come at the expense of consumer B benefitting from it also) and non-excludable (consumers cannot in general opt out of being protected by public enforcement).

234. Enforcers like the CMA provide this public good i.e. publicly enforce consumer law on behalf of all consumers, but their current powers and (some) businesses' behaviour limit how effectively enforcers can fulfil their role.

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[17] The Consumer Protection Study 2022 found that consumers did not take any action in 18% of detriment experiences. Where consumers took action, they predominantly contacted the seller (81%). In only 3% of incidents did consumers use a dispute resolution service and in only 1% did they take legal action.

235. In particular, the CMA has a leading and co-ordinating role in both the public enforcement of consumer protection law and in tackling markets where competition is not working properly due to market-wide practices and conditions that make it difficult for consumers to exercise choice. Therefore, improving the speed and responsiveness of the CMA's interventions has the greatest potential to safeguard the wider interest of consumers across the economy. This is why the CMA's powers are being comprehensively reformed, through both reform strands described in the next section.

236. However, government does not consider the public consumer enforcement landscape would be sufficiently improved by enhancing the CMA's enforcement powers alone. The CMA, as impactful an enforcer as it is, is not and will never be equipped to enforce against all suspected infringements of consumer protection law. Therefore, it is important that the other public consumer enforcers (e.g. sector regulators, LATSS) continue to play a significant role in public enforcement of the legislation and rules of law within scope of the court-based enforcement mechanism.

237. Government considers there is an enforcement gap where the trader suspects they will not be prosecuted (or where no criminal offence exists) and they know that the public civil court-based enforcement mechanism does not provide for the imposition of monetary penalties. This means that, at worst, traders will be required by the court to comply or, for breaches of the law causing a defined loss to consumers, to compensate those who have lost out. However, until a court order they can enjoy a competitive advantage or cause harm to consumers without any risk of a monetary penalty.

238. Therefore, in addition to empowering the CMA to impose monetary penalties, the reform package described below will introduce new discretionary civil monetary penalty powers to the existing court-based process.

Policy options

239. We considered the following options:

Do nothing:

240. Maintaining the status quo would not cause any change to the way in which businesses operate in the market, or the way in which consumer protection law is enforced. National and sector regulators and other enforcers would continue to rely principally on the current, court-based civil enforcement mechanism. While this offers flexibility to take the most appropriate action in response to actual or likely infringements, it does not allow for civil penalties in response to infringements or non-compliance with key enforcement processes. Local enforcers (mainly LATSS) would continue to rely primarily on criminal prosecutions which can penalise past behaviour but lacks the full suite of remedies for consumers.

241. The problem of lack of proportionate sanctions would remain, maintaining the current lack of incentive for compliance with consumer law and therefore government does not consider that this option is suitable.

Reform package option:

242. **Strand 1**: Make additional civil sanctions available to the CMA (under an administrative model and by application to the court) and all other public enforcers (by application to the court), for:

- **Non-compliance with information-gathering powers:** where a person fails to comply with a statutory information notice without reasonable excuse, a monetary

penalty of up to £30,000 or 1% of annual global turnover, whichever is higher, would be imposable, with an additional daily penalty of up to £15,000 or 5% of daily global turnover, whichever is higher, while non-compliance continues.

- **Breaches of undertakings:** where a person breaches an undertaking (without reasonable excuse, unless it was given to the court), a monetary penalty of up to £150,000 or 5% of annual global turnover, whichever is higher, would be imposable, with an additional daily penalty of up to £15,000 or 5% of daily global turnover, whichever is higher, while non-compliance continues.
- **Breaches of consumer protection law:** where a person breaches consumer protection law, a monetary penalty of up to £300,000 or 10% of annual global turnover, whichever is higher, would be imposable as outlined in the 2018 Consumer Green Paper.[18]

243. **Strand 2**: Establish a new administrative enforcement process for the CMA, giving it the powers to enforce core consumer protection laws directly in addition to the current court-based process. Under an administrative process, the CMA would have the power to, in particular:

- Decide whether a trader is infringing, has infringed or is likely to infringe certain consumer laws;
- If so, decide whether to direct the trader to bring infringements to an end or to stop future infringements, and where appropriate, require enhanced consumer measures (such as compensation) or make an online interface direction; and
- Where appropriate, direct the business to pay a monetary penalty for:
    - non-compliance without reasonable excuse with information notice requests made by the CMA,
    - breaches without reasonable excuse of undertakings given to the CMA,
    - breaches of certain consumer protection laws,
    - breaches without reasonable excuse of directions that the CMA has made,
    - provision of materially false or misleading information to the CMA in connection with its carrying out of its administrative enforcement functions.

244. The CMA will continue to be able to use its current enforcement powers via the civil courts (which government intends to strengthen with additional monetary penalty powers for the civil courts as set out above) and will retain the ability to use criminal enforcement options via the criminal courts for the most serious breaches of consumer law.

Non-regulatory option:

245. We do not consider a non-regulatory option to be applicable, because this change is about enforcing existing legislation rather than introducing new requirements on businesses. This change aims to tackle non-compliance with existing consumer law, for which there is no alternative to more and more efficient enforcement.

Policy objectives

246. The objective of the proposed changes is to improve the civil enforcement of consumer protection law to protect the collective interests of consumers. The intended effect of the reforms is to make public enforcement more efficient and dissuasive (i.e. incentivising greater compliance without necessarily having to start enforcement action), increase

[18] BEIS green paper, Modernising Consumer Markets, 2018

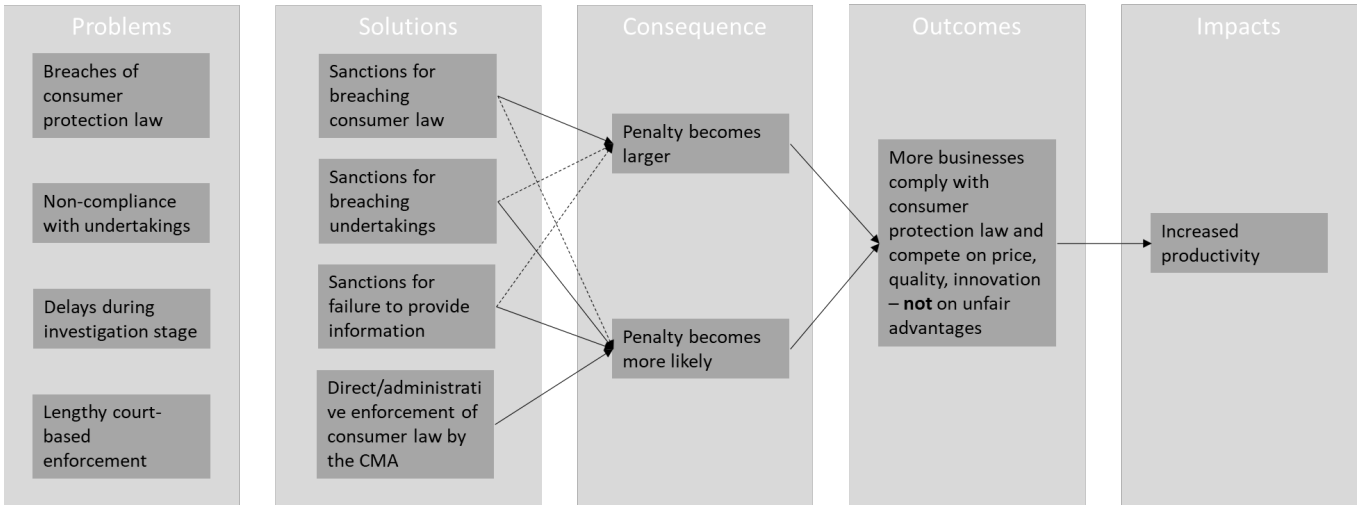
compliance with consumer law and ultimately lead to better outcomes for consumers when they purchase goods, services and digital content. More direct and intermediate objectives are to increase the number of opened and closed CMA consumer enforcement cases, shorten their average duration and increase their impact.

247. We would expect those changes to start having impacts earliest one to two years after implementation, because it would still take the enforcers time to gather evidence, prepare a case, process business representations, and reach a resolution (be it through agreeing undertakings or giving an infringement notice).

Cost benefit analysis

248. Figure 4 is a logic model showing how the proposed changes achieve the policy objectives. It illustrates how the proposed changes increase business compliance with consumer law through the two channels identified by the OECD study: size and likelihood of penalties. Higher compliance in turn shall encourage fair and open competition for consumers and so contribute to productivity and growth.

Figure 4: logic model for consumer policy enforcement reforms



249. The relationship between the effectiveness of enforcement on the one hand and the size and likelihood of penalties on the other hand is not necessarily linear. The OECD describes how incremental changes to very low and very high penalties can make only small differences, but large changes can have outsized effects.

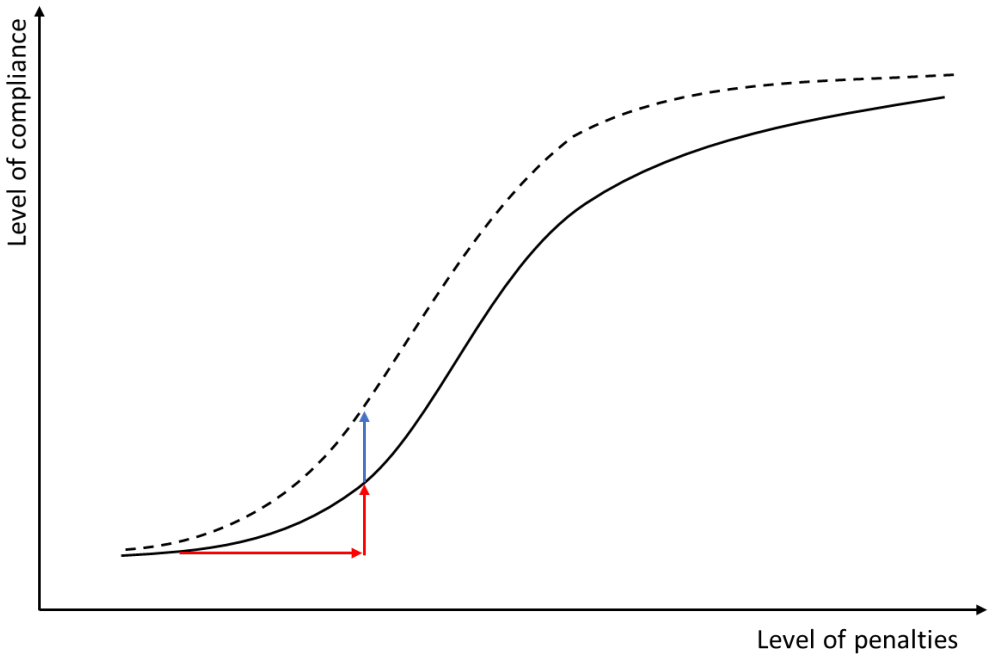
250. Figure 5 shows how compliance increases non-linearly with the size of the penalties (solid black line), for a given level of enforcement. For example, starting from low penalties, a fairly large increase in penalties is needed to moderately increase compliance (red arrows). A higher likelihood of being enforced against, for instance by more enforcement action, would increase compliance at all levels of penalties (blue arrow). However, this effect varies with the level of penalties. A higher likelihood of being enforced against will encourage less additional compliance if penalties are very low, because the consequences of non-compliance would still be minor.[19]

251. A large increase in compliance will thus typically need an increase in enforcement likelihood in combination with either an existing high level of penalties or an increase of penalties from a low level. Such changes would be in line with a key recommendation of

[19] In this chart we also assume a lower effect of increased enforcement likelihood for high level of penalties, because some businesses may be deterred only by action taken specifically against them.

the OECD report that a “suitable system of administrative financial penalties would enhance compliance”.

Figure 5: impacts on business compliance from changes to enforcement system



252. The proposed changes would tackle both dimensions and so produce a red and a blue arrow effect:

- Empowering the CMA to enforce consumer law directly rather than through the civil courts would enable the CMA to bring infringements to an end sooner, secure redress for consumers more promptly and use its resources more efficiently i.e. process more cases. It should also increase a given business’ perceived likelihood of being enforced against, thereby incentivising better compliance.
- Civil monetary penalties for non-compliance with information-gathering powers and undertakings would further improve enforcement efficiency and the likelihood of successful enforcement because businesses would have less opportunity and motivation to frustrate the process.
- Introducing civil monetary penalties for breaches of consumer law would increase the consequences of being held (either by the court or the CMA) to have breached consumer protection laws and hence the possible consequences of enforcement proceedings.

253. This analysis will next estimate how much additional enforcement activity we can expect from the changes and then explore how this increased caseload will impact consumers, businesses, and public finances. This quantification focuses on the CMA caseload and impact because it will be the only enforcer benefiting from both strands of the reform package. We therefore consider the CMA’s activities to be more impacted than those of other enforcers. The additional monetary penalties under strand 1 will benefit the other public enforcers as well, so we would expect some additional impact for their activities as well, both in terms of likelihood of enforcement activity being undertaken (as a result of strengthening the enforcement toolkit with new civil monetary sanctions) and deterrence. However, we have not been able to quantify these impacts.

Level of case activity to be expected

254. Between 2014 and 2021, the CMA has opened 28 consumer law enforcement cases, or around four per year, on average. The CMA estimates that the efficiency gains from an administrative model of enforcement could lead to a potential doubling of the number of enforcement projects from 4 to 8 per year. However, while the premise of more efficiency leading to more cases is sound, we are not aware of detailed modelling underpinning this assumption.

255. The case study on secondary ticketing cited above offers one potential point of comparison. The CMA suggested that it could have saved around one third to one half of the enforcement time and resources to secure compliance if a full administrative model of enforcement had been available at the time. The proposed changes could save managerial, delivery, economist and legal staff cost involved in servicing necessary court applications and appearances.

256. However, quantified estimates of the time and resources saved by the CMA are difficult, depend on the exact parameters of the administrative model and may not necessarily apply to other enforcement cases in the future, both contested (i.e. those resolved through the CMA determining a breach and giving an infringement notice to the enforcement subject) and uncontested (e.g. those resolved through an agreed outcome such as undertakings). To account for this uncertainty, we use the full range of the CMA's estimated saving of one third to one half. This translates to additional capacity of 50% to 100% or a total future 6 to 8 cases per year (i.e. an additional 2 to 4 cases per year).[20]

Impacts on consumers

257. Consumers may be involved in the CMA's enforcement action, e.g. being asked to provide evidence on cases, though this does not generally extend to intense personal involvement such as witness statements in hearings. Enforcement action can lead to refunds of payments to consumers where the CMA obtains redress (enhanced consumer measures) for consumers as part of the enforcement outcomes. More often, consumers benefit from avoided detriment due to the CMA stopping harmful business practices before they affect additional consumers. The CMA produces an impact assessment each year outlining the estimated impact of its consumer law enforcement activities over the previous three years. It estimates that its cases have created around £794 million in benefits to consumers from 2014 to 2022, around £99 million per year. [21]

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[20] Requiring half as much time means having twice as much capacity (+100%), in line with inverting the time saved: $\frac{1}{\frac{1}{2}} = 2$. Similarly, saving a third of time needed equates to a 50% capacity increase: $\frac{1}{\frac{1}{3}} = 1.5$

[21] Overall figure provided by the CMA. Also accessible from CMA IA publications:
CMA impact assessment 2016/17: consumer benefit between Apr 2014 and Mar 2017 of £178.3 million
CMA impact assessment 2017/18: consumer benefit between Apr 2015 and Mar 2018 of £184.1 million
CMA impact assessment 2018/19: consumer benefit between Apr 2016 and Mar 2019 of £192.6 million
CMA impact assessment 2019/20: consumer benefit between Apr 2017 and Mar 2020 of £210 million
CMA impact assessment 2020/21: consumer benefit between Apr 2018 and Mar 2021 of £391 million
CMA impact assessment 2021/22: consumer benefit between Apr 2019 and Mar 2022 of £439 million
All documents accessible via: https://www.gov.uk/search/policy-papers-and-consultations?content_store_document_type%5B%5D=policy_papers&order=updated-newest&organisations%5B%5D=competition-and-markets-authority&page=1&parent=competition-and-markets-authority

258. A blunt application of the increase in case activity to 6-8 could suggest an increase in consumer benefits by around £50m - £99m per year to a total of £149m - £198m. However, there are reasons why this might be an over- or underestimate.

259. The £50m - £99m could be an overestimate because it assumes that the efficiencies implied by the case study could be replicated throughout the CMA's consumer enforcement case work. Also, the CMA likely focuses its limited resources on the cases with highest impact (along with other prioritisation principles). Were it able to take on additional cases, these might yield lower impacts, although we expect such diminishing returns to only start at much higher enforcement activity levels.

260. On the other hand, the CMA is very clear in its impact assessments that it has been able to quantify only part of the beneficial impacts. For instance, the impact of some cases is not included at all, because the CMA did not consider the feasible methodologies robust enough. To the extent that the underlying existing benefits are higher than £50m - £99m per year, the relative increase would be higher as well. The CMA might also be incentivised to take on high-detriment cases that it previously considered too difficult or time-consuming to tackle with existing powers. Further, strengthened powers may themselves lead to additional compliance by businesses through deterrence and without the need for enforcement, as set out earlier in this assessment.[22] The CMA does not currently estimate a deterrence effect from its consumer protection activities, which also impacts the baseline.

261. To account for the uncertainty, we vary the upper and lower bounds by 50%, a value not supported by evidence. This suggests an impact of the proposals of £25m - £149m and that the total annual benefits of CMA consumer enforcement in the future model would be around £123m - £248m.

Impact on businesses

262. Only costs incurred by businesses found to be compliant with relevant obligations[23] would fall in scope of the business impact target. This happens if the CMA starts an investigation or enforcement case against a business and

a. it cannot prove that the business has committed a breach (either because there is insufficient evidence to establish the breach or because on the receipt of information from the trader, it's found to be actually compliant), or

b. the CMA applies to court for a relevant order against the business and the business is found not to be in breach (i.e. successfully defends the claim) at first instance or later on appeal to an appeal court, or

c. under the administrative model, the CMA gives an infringement notice which is later overturned by the court, following successful appeal by the business.

263. Any businesses found to be non-compliant with consumer protection law under the reformed process would broadly also be non-compliant under the current process. They

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[22] "DotEcon (2018): CMA Evaluation of CA98 cases - A DotEcon report" found evidence of deterrent effects in competition law enforcement cases and these are likely large compared to the direct effects. While no comparable analysis exists for consumer law enforcement, it is reasonable to assume that similar patterns could apply with a similar enforcement model. However, due to a lack of evidence we could not quantify the effect.

[23] These could be the relevant consumer protection laws, information notices, undertakings or CMA directions.

would fall under administrative exclusion J1 (regulator case work) of the Better Regulation Framework and their costs are therefore not scored against the Business Impact Target.

264. Compared to the status quo, we expect compliant businesses to incur costs relevant for the Better Regulation framework in two ways:

- Businesses who are the enforcement subject of new CMA administrative proceedings but are held not to have infringed consumer protection law (by the CMA itself or by the court on appeal from a CMA decision) will not have the option to apply to recover the costs incurred during CMA administrative proceedings. Under the current court-based process, a business can apply to the court for their costs of the first instance hearing where it successfully defended a CMA application for a court order or where a court order is made against the business at first instance but overturned on appeal. On such an application, the court could order the CMA to pay a proportion of the defendant's costs for the first hearing.
- An increase in enforcement activity overall means that additional businesses may become subject to an investigation or enforcement process and so incur costs in engaging with the CMA in circumstances where the CMA, following investigation of a business, may not progress the case and/or may decide there is no evidence of an infringement or likely infringement.

265. We do not expect many businesses to incur familiarisation cost, because this section's set of changes does not change consumer law as such (only how it is enforced) and so businesses do not generally need to take any actions in response.[24] Some businesses may choose to familiarise themselves, but this is not a requirement to comply with consumer protection law. If a business becomes subject to an investigation or enforcement process, it will need to familiarise itself with the new process, though this affects only very few businesses per year.

266. For completeness, third parties, i.e. not those suspected of infringing the law, can also face direct costs of complying with investigation processes. This is because, for example, the law already allows enforcers to compel information from any person, including a third party (e.g. trader's bank).

Cost recovery

267. Under the current court-based system, businesses incur (often significant) legal costs when going to court to defend a claim and/or application made by the CMA, e.g. for an enforcement order or interim enforcement order.[25] Under this process the CMA could be ordered to pay a proportion of the defendant's reasonable legal costs if the CMA's application was ultimately unsuccessful, e.g. where it could not prove that the business breached consumer law.[26] Such cost recovery only applies to litigated cases. Costs of the investigatory stage are not recoverable by a business, irrespective of the outcome at court. That is the position now with regard to regulatory investigations and it will be the position under the new administrative model.

268. Therefore, a potential new cost in scope of the business impact target would occur where businesses are subjected to administrative enforcement action by the CMA due to the new model but are ultimately judged to be compliant (either by the CMA itself

[24] Other measures in this bill do change consumer law and business familiarisation costs are considered as part of those regulatory changes' cost.

[25] Litigation costs can include, for example, costs for expert witnesses and court fees in addition to legal fees for external legal Counsel representing the business in any court proceedings.

[26] The general starting point would be that costs follow the event, although the court will have discretion to depart from this starting point and to take into account, for example, conduct and CMA success on specific issues.

following its investigation or on appeal to court[27]). Compared to the current system (where the CMA has to apply to court for an enforcement order for an infringement finding to be made), such compliant businesses will be worse off by any cost that a court may have awarded them as a result of successfully defending the case in enforcement proceedings before the court (because the cost of responding to and participating in administrative enforcement action by the CMA is not recoverable). This effect is not so much that businesses incur more costs. It rather reflects a comparison between the proposed administrative model, where the CMA can make an infringement finding, and the existing model, where the CMA has to apply to court for an infringement finding. With the former the business will have to cooperate with the CMA process which can lead to an infringement decision (and the cost of that process is not recoverable even if the end result if there has been no breach of consumer law). With the latter, the business has to participate in the court process which may lead to judgment and consumer protection order (i.e. the court rules there has been a breach of consumer law) but, in the event the business successfully defends the CMA's case, it will likely recover a proportion of the costs of litigation.

Cost of additional compliant business being investigated or enforced against

269. The aggregate cost of additional compliant businesses being subject to an investigation or enforcement process is the product of the cost per process and how many additional businesses are likely affected. We consider each of these in the following paragraphs.

Costs of responding to information notice requests

270. The cost to a business of being subject to an investigation process include producing information for the CMA in response to its statutory information gathering powers, e.g. a notice under paragraph 14 of Schedule 5 to the Consumer Rights Act 2015. We have little evidence on the scale of these costs. Information used to assess other regulatory changes in this document suggests that the costs could be significant.

271. However, we do not consider the reform package to increase the cost of complying with investigation processes. This is because the powers which Part 3 of Schedule 5 to the Consumer Rights Act 2015 gives to enforcers to compel enforcement subjects or third parties to produce information (which incurs them said costs) will not change in substance.

Costs of the new administrative enforcement process

272. The costs to a business of being subject to an enforcement process under the proposed administrative process broadly may include:

    a. reviewing the CMA's case file and non-confidential information underlying it,
    b. producing written submissions for the CMA,
    c. preparing witness evidence,
    d. attending hearings,

273. If held to have infringed consumer protection law, broadly:

[27] However, a business will be able to recover, generally, a proportion of its legal and litigation costs associated with the appeal to court, if successful in litigation against the CMA. The court has a wide discretion in awarding costs.

a. the costs of taking the actions required to achieve compliance, e.g. implementation costs to change/ stop business practices and any resulting lost revenue

b. the costs of any remedies imposed, e.g. any compensation having to be paid to consumers

c. the costs of any monetary penalty imposed for any breach.

274. Some similar formal steps exist and therefore incur costs for enforcement subjects under the existing court-based process. This can include reviewing the application to the court for an enforcement order, preparing and filing a defence, preparing written witness statements and/or instructing expert reports, attending court hearings, having to comply with the terms of a court order and more. In both cases it is likely the business under investigation will incur significant legal costs. Therefore, we believe that the proposed reforms will not significantly change the cost incurred by a business subject to an investigation process which results in an infringement finding. That is, we broadly expect a business to incur similar cost irrespective of whether the CMA makes a decision under the new administrative enforcement model or a court makes a decision following an enforcement action by the CMA under the court-based enforcement mechanism.

Cost of penalties

275. The costs of monetary penalties would be a new direct cost because the court does not currently have powers to impose monetary penalties (although it may currently order a business to pay redress to consumers). However, this type of cost is excluded from consideration of EANDCB under administrative exemption G for fines and penalties. The penalties would be determined on a case-by-case basis and so costs would vary accordingly and cannot be accurately estimated at this stage, but the legislation will limit the maximum penalties as described above. We do not include these costs in this impact assessment and note that we are not increasing the regulatory burden on compliant business. Where businesses comply with the existing legislation and work with enforcement bodies in good faith, they would not incur cost from monetary penalties.

Cost of lost revenue

276. Businesses might also incur a cost of lost revenue when required to stop a business practice as a result of a direction imposed by the CMA. For instance, displaying information more clearly could mean that some consumers choose not to purchase a service or to buy it from a different provider. This is the business-side cost of the positive impacts on consumers mentioned above.

Number of compliant businesses subject to an investigation or enforcement process

277. The CMA's Competition Act 1998 (CA98) cases are a possible benchmark for the number of businesses which were found de-facto compliant at some point during the process, because these cases are processed under a mechanism similar to the proposed one. Out of 43 opened and closed CA98 cases between 2014 and 2021, three were closed because the CMA saw no grounds for an action decision. This suggests that in around 7% of cases (3 out of 43) potentially compliant businesses may have been affected by CMA activity.

278. Applied to a potential increase in consumer enforcement activity of 2 – 4 cases per year due to the reforms, this suggests that an additional 0.1 to 0.3 cases per year will involve compliant businesses being investigated or enforced against.[28]

279. The CMA also closed a further nine CA98 cases between 2014 and 2021 based on administrative priority grounds. Some of these cases may have involved compliant businesses as well, though it is not possible to form an assumption. Aside from the prospect of a successful outcome, the CMA reprioritises case load based on several factors such as impact, strategic significance, and resources.

Cost to the public of additional appeals

280. To estimate the likely cost to the public from additional appeals, we first calculate the likely number of appeals. We can calculate the likely number of appeals through two methods: firstly, based on the number of instances in past consumer enforcement cases where the CMA applied to a court for an enforcement order in relation to total consumer cases opened; secondly, a similar metric but based on CA98 cases. Both methods have merit, because the first remains in the same subject area, while the second mirrors the CMA powers and process under the reformed model more closely.

281. Out of the CMA's 28 consumer enforcement cases opened between 2014 and 2021 it took legal action against three businesses in that period. That makes for a rate of 0.1 legal actions for each started case (3 court actions out of 28 cases). While we do not know in how many cases businesses would appeal a CMA decision under the new administrative enforcement mechanism, we believe that 0.1 appeals per case is a reasonable proxy for the share of cases that are 'contentious' and would see appeals. Put differently, this represents the cases which the CMA cannot resolve through undertakings and for which it currently needs to apply for a court order. Under the proposals, in general we would expect such cases to instead go through the new CMA administrative process, resulting in a CMA infringement decision that businesses would then be able to bring appeals against.

282. Following the second method, the CMA has opened 56 CA98 cases since its creation in 2014. These have led to 27 infringement findings, and 6 appeals – around 0.11 appeals per case (6 appeals out of 56 cases). A different assumption is based on how many cases lead to an adverse finding. If the CMA reaches a larger number of infringement decisions, it is likely to see a higher number of appeals. The current consumer enforcement model does not make for a useful comparison because the CMA does not make infringement decisions in this model. From the CA98 cases, we see 27 infringement decisions arising from 56 cases, or around 48%. It is difficult to forecast the number of infringement decisions the CMA will reach. However, even an extreme scenario in which **all** the CMA's consumer cases led to an infringement decision (instead of, for example, undertakings) would not significantly affect the final estimate. Based on the CA98 case history, 6 out of the 27 infringement decisions mentioned above led to appeals, or around 0.22 appeals per case.

283. Table 5 below summarises this information and calculates the estimated number of appeals from a revised enforcement system. It shows that we expect between 0.2 and

[28] Lower bound: two additional cases per year x 7% = 0.6 cases with complaint businesses per year
Upper bound: four additional cases per year x 7% = 1.1 cases with complaint businesses per year

1.4 additional appeals per year, depending on how many more cases the CMA will be able to process (2-4 additional) and how many of these will see appeals (between one in ten and one in four cases). Note that the higher end of the estimates implicitly assumes a higher rate of appeals for the baseline caseload than has been historically observed.

Table 5: Total estimated appeals to CMA decisions under the proposed consumer law enforcement model

	Total cases per year	Number of appeals per year	
		Low rate of appeals (0.1 per case)	High rate of appeals (0.22 per case)
Status quo	4	0.4	
Low additional caseload	6	0.6	1.3
High additional caseload	8	0.8	1.8

284. We do not hold information about the current or future costs to the High Court in England and Wales or Northern Ireland or the Court of Session in Scotland (which will act as appellate courts under our proposals) of hearing consumer cases. We have some information about the cost of cases heard by the Competition Appeals Tribunal (CAT), which hears appeals to CMA competition infringement decisions and so could be a useful point of comparison. While engagement with MoJ officials suggests that these might be overestimates, they are the only available figures so we use them with the view that costs to the public are very unlikely to exceed these estimates. The tables below show that the length of appeal for CAT cases is broadly similar to that of the High Court, with one outlier taking significantly longer.

Table 6: CA98 appeals cases heard at the CAT

Case name	Length of appeal (months)
Hotel online booking investigation	6
Supply of galvanised steel tanks for water storage: civil investigation	8
Electronic drum sector: suspected anti-competitive agreements 50565-5	8
Sports equipment sector: anti-competitive practices	10
Pharmaceutical sector: suspected anti-competitive agreements and conduct 50507.2 (Nortriptiline - Auden McKenzie, King Pharmaceuticals, Lexon and Alissa)	10
Supply of precast concrete drainage products: civil investigation	12
Phenytoin sodium capsules: suspected unfair pricing	16

Paroxetine investigation: anti-competitive agreements and conduct	23
Average case duration	**11.6**
Median case duration	**10**

Table 7: Consumer cases heard at the High Court

Case name	Dispute	Duration (months)
Viagogo v CMA	Compliance with multiple consumer laws	11[t]
CMA v CareUK	Unfair terms	30*
Casehub v Wolf Cola	Unfair terms	6
Weco Projects v Pier Luigi Loro Piana, Credem Leasing & Peters and May	Jurisdiction of the Consumer Rights Act 2015	12
Higgins & Co v Evans	Unfair terms	7
Average case duration		**13.2**
Median case duration		**11**

This was not a full hearing of a consumer case. Rather, the matter was settled on the day of and immediately prior to the first hearing for interim relief. If the matter had continued to be contested, then the case would have lasted for longer.

* This case duration may have been impacted by the Coronavirus pandemic. Proceedings were re-scheduled from June 2020 to May 2021. However, we do not know how much of the delay, if any, was due to the pandemic or would have happened regardless.

285. The CAT is funded at around £6 million per year and hears around 110 cases per year. This would suggest a cost per case of around £55,000 and an annual cost of additional appeals of around £11,000 - £74,000, based on 0.2 – 1.4 additional appeals per year. However, this assumes that all cases heard require a similar level of resourcing. Further, this comparison assumes that the duration of an appeal is proportionate to the number of sitting days required by a court/tribunal and that both organisations' costs per day are comparable. To account for these uncertainties, we assume an additional 50% variation on each threshold, to arrive at an annual cost to the public of additional appeals of £5,000 - £111,000 per year. This impact of additional appeals on the court system is also considered in the Justice Impact Test accompanying this impact assessment.

Impact summary

286. In sum, we expect these proposals to produce benefits for consumers of between £25m and £149m per year and moderate costs for businesses. Most of the costs will likely fall on non-compliant businesses and are therefore out of scope. However, a comparison with a similar competition enforcement process suggests that compliant businesses may

also occasionally be affected and incur costs. We have little information about how high such costs on compliant businesses may be, though can perform break-even analysis: we expect 0.1 to 0.3 cases per year where compliant businesses are subject to an investigation or enforcement process. The cost per case would thus have to be at least £89m for costs to potentially outweigh benefits (and likely much higher), which we consider unlikely.[29]

Small and micro business assessment

287. The impact of the changes on micro and small businesses will depend on the number and kind of cases that the CMA will undertake with these changes, compared to its expected activity under current arrangements. As indicated in their impact assessment, the CMA tends to focus their investigations on a handful of (larger) businesses with the ambition to set a precedent for market-wide behaviour change. So, we would expect most additional activity to focus in medium and large businesses. However, CMA activity can also affect smaller businesses as shown by its actions on social media endorsements. Regardless of the size of the businesses involved, we again expect most business impacts to fall outside the EANDCB and BIT score, because it relates to non-compliance of businesses with existing consumer law.

288. Conversely, we anticipate that small and micro businesses would benefit from these proposals as we anticipate that they will result in increased compliance and a decrease in anti-competitive practices. We do not think that small and micro businesses would benefit from exclusion from these proposals. The proposals are designed to increase enforcement of consumer protection. If small and micro businesses were exempt, then it is possible that – subject to consumer awareness – consumers would be more inclined to shop at larger businesses where they feel they are more likely to be offered consumer protection. Only businesses that are non-compliant with existing legislation would be negatively affected by the proposed changes and the encouragement toward increased compliance would likely prevent unfair competition. Therefore we are not seeking to exclude small and micro businesses.

Equalities assessment

289. The impact on protected characteristics will depend on the number and kind of cases that the CMA will undertake with these changes, compared to its expected activity under current arrangements. The CMA prioritises its interventions to protect vulnerable consumers in particular. Consumer vulnerability overlaps with protected characteristics in areas such as age and health & disability, though the concepts differ on the other characteristics. Examples of past work with a direct positive impact on protected characteristics include the CMA's cases on care homes, social media and online endorsements, online gambling, and self-funded in-vitro fertilisation.

Monitoring and evaluation

290. The Bill imposes record-keeping requirements on the CMA in relation to undertakings it accepts and any directions it gives under this its administrative enforcement process and any reviews it carries out of their effectiveness. In addition, the CMA will be required to prepare and publish a report on the effectiveness of its undertakings and enforcement directions, and the number and outcome of appeals, if requested to do so by the Secretary of State. While we consider that the overall effectiveness of the CMA direct enforcement process has to be assessed according to a variety of other factors, these reports would assist with monitoring and evaluation.

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[29] Lower bound of consumer benefits / higher bound of cases where compliant businesses are affected: £25m / 0.3 = £89m

291. In addition, the CMA's annual impact assessments and published updates on opened and closed cases should allow further monitoring of outputs and impacts. This includes the number of cases opened, closed, average case durations and – with some caveats around quantification challenges – aggregate medium-term impact of cases.

292. Given that cases may still take over a year or two to process, including upfront evidence gathering and especially for contentious cases, an evaluation should start around four years after implementation at the earliest. An evaluation would likely focus on a selection of case studies to assess how well the reforms met their objective of increasing the CMA's process efficiency. This could include contentious and straightforward cases to understand the impact across the CMA's case portfolio. The evaluation should aspire to evaluate the deterrent effect as well, though we note the paucity of evidence and measurement difficulties in this area.

Prepayment protection – unregulated "savings schemes"

Problem

293. These regulatory changes relate to schemes which allow consumers to save money for a later benefit, but which do not currently have statutory protections for money paid in. Typically, these savings mechanisms are seen by consumers as a good way to 'lock away' money solely for a specific purpose and ensure that they do not spend it elsewhere. Some examples include Christmas expenses or school uniform and stationary costs before the start of each school year.

294. The type of "savings schemes" within scope of this reform are those run by businesses not regulated by the Prudential Regulation Authority or the Financial Conduct Authority. A firm running such a scheme will only be regulated if it engages in other financial activities that are within the remit of regulators. As a result, there is no legal obligation on these businesses to take steps to protect consumer prepayments in the event of business insolvency. However, work undertaken by the Law Commission concluded that an average consumer perceives these schemes to be savings schemes and therefore expects the same protections as they would receive from a bank.

295. The savings in such schemes tend to represent large amounts for the consumers involved, especially for those who are struggling financially. The Law Commission therefore considered that these schemes represent a high risk for people who can ill afford it, and who are without effective protection if insolvency occurs. A typical example of this type of "savings scheme" is the Christmas savings club model through which consumers make regular payments over the year, which are then credited in November or December. Typically, Christmas savings clubs do not return cash to consumers in the way that banks and building societies do. Instead they take prepayments for products, services or vouchers.

296. The most well-known example of how consumers have lost pre-payments as a result of an insolvency was the 2006 collapse of the Christmas savings club Farepak. At the time, Farepak owed £37m to its roughly 100,000 customers, amounting to around £400 per Farepak customer on average and with some owed as much as £2,000. While its customers did eventually receive around half of their prepayments back, 70% of this came from compensation funds set up to meet hardship and even that was received only six years later.[30]

297. Voluntary protection schemes have been set up in the wake of the Farepak collapse in 2006, such as the Christmas Prepayment Association (CPA), which is a self-regulatory trade association. Members of the CPA must comply with the CPA's Code of Conduct

[30] Law Commission report

and are required to pay any consumer savings into a designated trust account. The trust account will be overseen by trustees, half of whom must be independent of the member. The CPA's Code of Practice also requires funds to be invested in a PRA regulated bank or building society account. The trusts are thus structured to provide FSCS protection if the relevant financial institution fails. However, only two schemes are currently covered by the CPA code. Even for them, the Law Commission identified that a business can leave the Association when they start to suffer financially, leaving them free to end the trust, use the money and leave consumers without protection again.

298. Requiring these schemes to take steps to protect consumer savings could improve the consumer experience of prepayments and could reduce the risk for some of the more vulnerable consumers who might be most affected by business insolvency.

Rationale for intervention

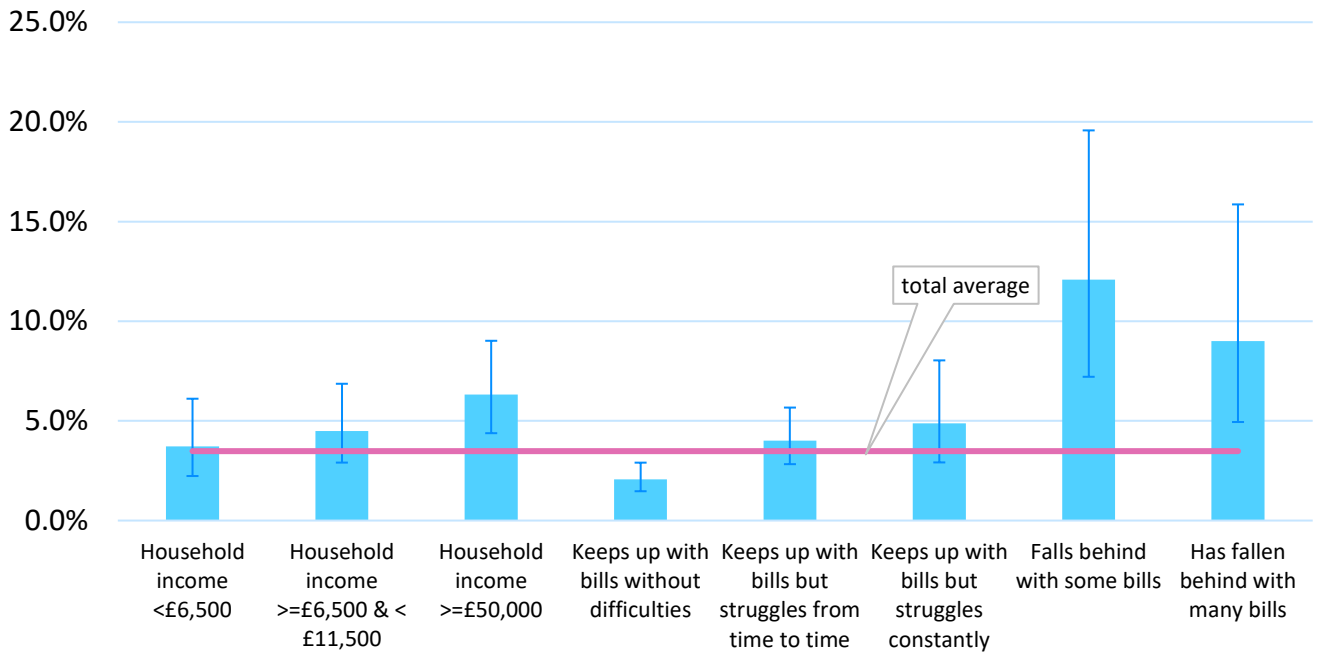
299. The main market failure that this intervention seeks to address are information failures. The typical consumer will likely know little about a savings club's risk of insolvency and thus the risk to their prepayment, whereas savings club businesses are better informed of their financial viability (**asymmetric information**). Further, as suggested by research by the Law Commission, an average consumer perceives these schemes to be savings schemes and therefore expects the same protections as they would receive from a bank. So, the businesses likely also have an advantage in their better knowledge of the relevant regulation. Consumers might also focus more on the immediate challenge to save up for expected expenses than on distant and unlikely risks (**myopia**).

300. Government intervention in this area could have positive **equality impacts**. Users of Christmas savings clubs are traditionally understood to be predominantly on lower incomes, which would make losses particularly impactful. However, data from the 2018 UK Financial Capability Survey paints a more nuanced picture.[31] This survey asked a representative sample of UK consumers whether they held any investments or savings in savings clubs e.g. Christmas savings clubs (but also other, similar, products). Figure 6 shows usage of savings clubs for consumers with different household income and subjective financial health levels, along with 95% confidence intervals. Key observations include:

- Across the sample, around 3.5% of respondents held investments or savings in a savings club (the orange bar in the chart).
- Households on the lowest income bracket had a usage of Christmas savings clubs in line with the average population. The second-lowest income households had moderately higher use of Christmas savings clubs, though not statistically differently so. Interestingly, the highest-income bracket had the highest use of savings clubs.
- Households with better subjective financial health – those who find it easier to pay bills on time and honour financial commitments – reported a lower or average use of savings clubs. Conversely, those facing financial difficulties were much and statistically significantly more frequent users of savings clubs.

[31] https://www.fincap.org.uk/en/articles/financial-capability-survey. Survey micro data accessed via UK data service: https://beta.ukdataservice.ac.uk/datacatalogue/studies/study?id=8454

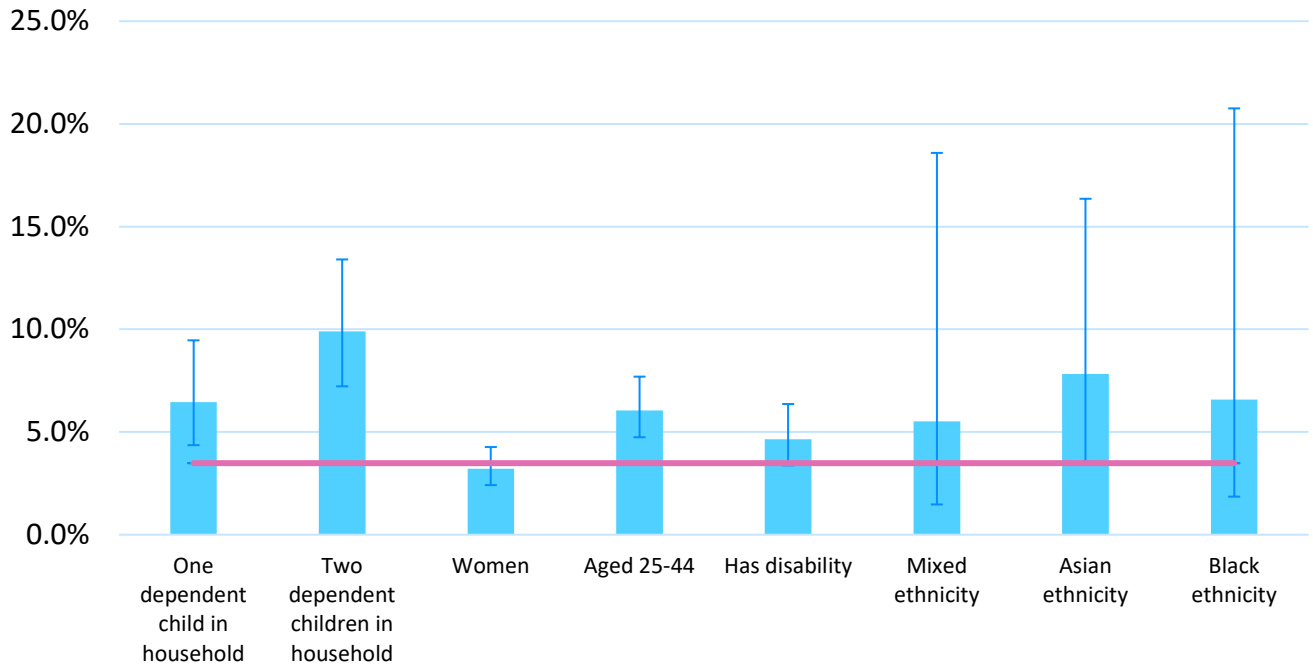
Figure 6: Share of respondents using savings clubs, by financial characteristics



301. Figure 7 shows a similar breakdown for different socio-demographic characteristics. This figure helps explain some of the findings from the financial patterns just observed, but also allows exploring how people with protected characteristics are affected by the problem:

- Households with one or two dependent children had significantly higher use of Christmas savings clubs than the average respondent.
- There was no notable difference between genders of using Christmas savings clubs.
- Respondents aged 25-44 reported a statistically significantly higher use of Christmas savings clubs, while all other age cohorts had a lower use. This may be related to the products being used heavily by families with dependent children.
- Respondents with a disability also reported a higher use of Christmas savings clubs, though that difference is not (quite) statistically significant.
- Respondents with mixed, Asian or Black ethnicity could be more likely to use savings clubs than white respondents, though the large statistical variation (due to small sub-samples) does not allow definitive conclusions.

Figure 7: Share of respondents using savings clubs, by personal characteristics



302. The higher use of savings clubs by both high-income households and those falling behind on bills could thus partly be explained by having children in the household and the entailed additional expenses.

303. In sum, government intervention on the basis of equality and to protect the vulnerable would mostly revolve around families with children and those facing the most difficulties to pay bills. To a lesser extent, it could also disproportionately benefit consumers with disabilities and those from black, Asian and mixed ethnic backgrounds.

Policy options

Do nothing

304. Christmas savings clubs, such as the one previously run by Farepak, and similar savings schemes are not regulated as financial institutions by the Prudential Regulation Authority or the Financial Conduct Authority. A firm running such a scheme will only be regulated if it engages in other financial activities that are within the remit of regulators. As a result, there is no legal obligation on these businesses to take steps to protect consumer prepayments in the event of business insolvency. While some businesses have agreed to voluntary actions, it is unclear whether these would provide sufficient protection in case of an insolvency. Further, being voluntary, not all businesses offering relevant savings schemes necessarily offer even such voluntary protection mechanisms. Further insolvencies like Farepak could thus continue to occur and harm consumers.

Proposed option

305. The aim of the provision is to ensure that in-scope businesses which offer qualifying consumer savings schemes (as defined in the Bill) should protect those prepayments by way of a trust or insurance. In order to maintain proportionality and recognise the role of smaller shops in the community, certain schemes run by microbusinesses will be excluded from the provisions. To be excluded from these provisions a microbusiness scheme must not have more than 5% of customers with accumulated savings of £120 or more per person in the 12-month period.

306. Businesses will be able to decide whether to opt for a trust or insurance cover. Whichever protection method is used, all payments made by the consumer to the scheme should be protected in full in the event of insolvency of the business. On insolvency, money which has been held in trust for prepaying consumers can be distributed to them rather than to creditors generally.

307. The trader offering a qualifying consumer savings scheme will be under a legal duty to convey prescribed information to a consumer about the protection model it uses to protect consumer prepayments regardless of the method.

308. The above requirements will apply to a consumer savings scheme where the business takes consumer prepayments in return for goods, services, digital content or vouchers (subject to specified exclusions). For the purposes of this part of the Bill, a consumer savings scheme is a contract between a consumer and a trader under which (subject to certain exclusions)

a. a consumer makes prepayments to a trader,
b. the trader credits those prepayments to an account that is held by the trader for the consumer ("the consumer's account"), and
c. the prepayments credited to the consumer's account provide a fund for the consumer to redeem as goods, services, vouchers or digital content in accordance with the terms of the contract, and
d. If the contract contains terms which either
    i. have the objective or effect of restricting the times at when the consumer may redeem funds,
    ii. incentivise the consumer to refrain from redeeming funds at certain times, or
    iii. is advertised in a way to encourage the consumer to redeem or refrain from redeeming at certain times.

Trust Arrangements

309. The provisions will set out minimum requirements for trust instruments to ensure they operate with sufficient independence from the business and also to ensure consumer monies held in the trust can only be used for specific purposes. The provisions are as follows:

(1) the majority of trustees of the trust which hold consumer prepayments are independent of the business providing the savings scheme;

(2) the authorised purposes for which trust monies can be released for or spent on are as follows:

- to pay suppliers in order to procure goods requested by savers
- to return to the consumer in the event of exceptional circumstances
- to pay VAT to HMRC
- to pay any profits arising once saver orders have been satisfied
- to reimburse savers in the event of the insolvency of the savings scheme provider

(3) there is an independent audit of trust accounts every three years

Insurance

310. Businesses opting to procure insurance to protect in-scope consumer savings schemes will need similar arrangements to those specified in in regulation 22 of the Package Travel and Linked Travel Arrangements Regulations 2018 which sets out the requirements for insurance cover to protect travellers against the risk of the package

travel organiser's insolvency. The business must take out one or more insurance policies which recognises the consumers as the insured persons and therefore pays direct to the consumers in the event of insolvency. The insurance must cover the cost of refunding all payments made by the consumer for any service not fully performed as a consequence of insolvency. Operators must ensure that any insurance policy that they secure is not voided due to negligence or a breach of condition on their part.

Non-regulatory options

311. Non-regulatory options have been at the heart of the policy response to the Farepak collapse, with mixed results. Government has been encouraging trade bodies to agree voluntary schemes to protect consumer prepayments in high-risk industries. Examples include (i) the Christmas Prepayment Association (CPA) whose members are required to pay any consumer savings into a designated trust account, and (ii) the Consumer Codes Approval Scheme which (for some codes) requires protection of prepayments via insurance, trust arrangements, ring fencing or bonding and have had Government backing.

312. It could be argued that requiring the statutory protection of consumer prepayments in such schemes is unnecessary when voluntary schemes designed to protect consumers by requiring protections for prepayments of its members, such as the CPA, exist. However, in addition to the risk highlighted by the Law Commission research that a company in financial difficulty might withdraw from the scheme before reimbursing consumers, the Government notes that membership of these schemes is not widespread and has declined in recent years (see cost-benefit analysis section). Large supermarket savings schemes and the many smaller retailers are not members of voluntary schemes, and could attract considerable sums in "savings" from consumers.

313. We thus consider non-regulatory options to have reached their limits and for further improvements and comprehensive consumer protection to require legislation.

Policy objectives

314. The policy objective is to protect all consumer pre-payments made under qualifying consumer savings schemes, so that businesses offering these services can repay consumer monies even if they become insolvent. No consumer must lose out from entering into such a contract. Businesses should have effective protections in place and the objective shall be achieved within at most a year of the regulation taking effect (though likely less).

Cost-benefit analysis

Size of the market

315. We hold limited information about the market size of savings clubs. As per 2021, the Christmas Prepayment Association ("**CPA"**) has two members: Park Christmas Savings Ltd and Variety Christmas Savings Club Ltd, which we understand to cover a large part of the Christmas savings clubs market.[32] In addition, at least six major supermarkets run Christmas savings clubs or similar schemes.[33] In total, we estimate that there are probably around 10 – 20 organisations that fall within scope of the planned regulation. This excludes financial institutions' and credit unions' Christmas savings accounts –

[32] http://www.cpa-advice.co.uk/
[33] https://web.archive.org/web/20211101132907/https://www.moneysavingexpert.com/savings/extra-christmas-cash/

which are protected by FSCS – and micro businesses (e.g. local butchers) as per the policy description above.

316. According to the UK Financial Capability survey, 3.5% of respondents said they had savings or investments in any type of savings club. However, the survey did not ask how large such savings were. According to news reporting from 2019 and 2021, Park Christmas Savings had 420,000 customers in 2018, with total savings of £222m.[34] [35] This would amount to around £571 per customer at 2021 prices[36] – higher, but still comparable to the average money owed per customer by Farepak of £500 at current prices[37] and comparable to the average savings per customer shared by businesses during our engagement.

317. Combining the above evidence suggests that around 1.8m UK consumers may use savings clubs (51m adults x 3.5% use of savings clubs) and may hold around £1.0bn of funds in them (1.8m users x £570 average balance per user).

Impacts on businesses

318. We have engaged with representatives from a large Christmas savings business and from the CPA to understand the kind of impacts the regulatory changes could have. Where a savings club business currently protects consumer monies it does so by holding the funds in a separated trust account, though there are different variants of how exactly such trust account models can work. The two organisations mentioned one-off cost for setting up trusts to administer consumer monies and ongoing costs to run these trusts.

319. One-off cost includes the legal fees to structure a trust and draw up the necessary legal documents. Businesses advised that these costs vary depending on the complexity and the number of independent trustees required and could run up to £10,000 - £20,000 for large businesses with complex trust arrangements.

320. Ongoing costs include the salaries of independent trustees and finance staff as well as regular statutory audits of trust transactions. Finance staff are required to manage the regular deposits into and withdrawal from trust funds of consumer monies (for purchasing gift cards or vouchers) and to prepare documentation for trustees. Businesses felt that most costs scale with the amount of consumer monies being administered (though not necessarily proportionately so). They felt that such ongoing costs of running a trust could range between £10,000 and £100,000 per year, depending on the size of the business and trust arrangements. These costs would be fully in addition to the cost of running a savings scheme without protecting consumer monies.

321. Put together, this suggests total one-off costs of around £0.2m[38] and total recurring cost around £0.2m - £1m per year for the industry of implementing and complying with the planned legislation.[39] These costs need to be netted off against the costs incurred by the members of the Christmas Prepayment Association who already substantively comply with the rules and would not incur material additional cost due to the legislation.

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[34] https://www.thisismoney.co.uk/money/saving/article-6570433/Why-Xmas-savings-club-2019-prove-costly-mistake.html

[35] https://www.moneysavingexpert.com/family/christmas-savings-clubs/

[36] £222m / 420,000 = £529 per customer. Inflation adjustment of 8%: £529 x 1.08 = £571.

[37] £370 per customer in 2006 prices, uprated by 35% inflation between 2006/07 and 2020/21 according to GDP deflators = £499.5.

[38] For the low aggregate cost estimate we combined the low estimate of the number of businesses in the market with the high estimate of per business cost: £10,000 x 20 businesses = £200,000.
The high-cost estimate is the high number of businesses x the low cost per business. While this is imperfect, we know too little of the size distribution for a better methodology: £20,000 x 10 businesses = £200,000.

[39] For the low aggregate cost estimate we combined the low estimate of the number of businesses in the market with the high estimate of per business cost: £10,000 x 20 businesses = £200,000.
The high-cost estimate is the high number of businesses x the low cost per business. While this is imperfect, we know too little of the size distribution for a better methodology: £100,000 x 10 businesses = £1m.

Considering that the two CPA members account for a large share of the pre-payments market (per our definition), we assume that their members' cost would be at the higher end of the range. We thus estimate that £30,000 of the above total one-off are not applicable due to most (though maybe not all) changes having already been implemented by these businesses. Similarly, they already incurred £150,000 of ongoing cost which should be excluded from regulatory cost. Therefore, we estimate total additional one-off policy cost of £0.17m and total additional ongoing policy cost per year of £0.18m - £0.85m.[40]

322. Specialist insurance could be another way for savings clubs to protect consumer monies, However, no such insurance products exist at the moment, and none may be developed, given the relatively small market size. Our cost estimates thus focus on the trust account model. The above estimates may be an overestimate if insurance became available and cost less. Further, business costs may be broadly neutral across the full business population in an insurance model, because any cost would represent transfers from savings clubs to insurance companies (and in the other direction in the event of an insolvency).

Small and micro business impact

323. Microbusiness schemes with at most 5% of customers with accumulated savings of £120 or more per person in the 12-month period are excluded from the requirements. It is therefore possible that some micro businesses could fall in scope, although we hold no information as to their potential number. We consider this exemption proportionate, as the impact of losses over £120 on individual consumers could be material and outweigh the case to limit burdens on businesses.

Impacts on consumers

324. Consumers could be affected by these changes in two ways. Firstly, business might pass on increased operating cost from trust and/or insurance models to consumers e.g. in the form of less generous savings bonuses. Secondly, consumers would no longer be at risk of losing pre-payments in an insolvency, because 100% of their monies would be protected.

325. We cannot quantify either effect. While we have some broad estimates of the reform's cost impact on businesses, we do not know how much of the additional cost, if any, would be passed on to consumers. Regarding the second effect, we believe that due to the size of the market we cannot apply generic assumptions on insolvency probabilities and that the probability of insolvency is instead determined by the risk profile of the few involved businesses at a given time.

Impacts on third parties

326. It is likely that any additional payments secured for consumers in an insolvency would come at the expense of other creditors such as employees or suppliers. The alternative assumption would be that savings clubs permanently increase their current assets basis.

Impact summary

327. While we cannot quantify all impacts of the policy changes, we can make some useful statements:

- The main benefit is that consumers do not lose out from insolvencies of savings clubs. This benefit comes directly at the expense of other creditors and is thus NPV neutral.

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[40] Lower bound: £10,000 cost per business if relatively small x (20-2) businesses = £180,000.
Upper bound: £100,000 cost per business if large x 10 businesses - £150,000 baseline cost = £850,000.

- The policy also involves small, but non-trivial set-up and administration cost for trusts managing consumer monies. While our cost estimates are highly uncertain, based on the available information the EANDCB is likely smaller than £1m.
- Overall, the policy thus likely produces a negative NPV, absent any wider benefits like increased consumer confidence in using savings clubs.

Small and micro business assessment

328. As set out in the policy options section, this policy includes an exemption for certain types of micro businesses to mitigate potential disproportionate impacts. Any micro businesses not covered by this exemption and any small businesses will still need to protection consumer monies due to large amount of monies involved for consumers individually and/or on aggregate.

Equalities analysis

329. The section "Rationale for intervention" included survey evidence on which groups of consumers are more likely to use savings clubs. Except for the targeted micro business exemptions, we consider the policy fully effective to address the policy problem once implemented. The equalities impact will therefore have identical patterns to those identified earlier, provided that there is no significant difference between socio-demographic groups in the use of micro-business-provided savings schemes as opposed to schemes by larger businesses.[41]

Monitoring and evaluation

330. We are not planning any monitoring and evaluation activity for this measure, because there is no relevant existing or easily producible evidence and there would be limited use cases for M&E information. Due to the small number of businesses affected by the changes, collecting information on actual implementation cost would depend on their willingness to engage. Such information may also add relatively little to the evidence base and it is unclear what further policy action could be taken as a result. Given that the policy will include full protection, there is also no need to monitor consumers' levels of savings clubs holdings. There could be a case for monitoring compliance, though as an enforcement issue this would fall outside of DBT's remit.

Alternative Dispute Resolution

Background

331. Alternative dispute resolution (ADR), in relation to consumer disputes, refers to methods of resolving disputes between consumers and traders out of court. For example, one form of ADR is mediation, where an independent third party helps the disputing parties to come to a mutually acceptable outcome; another form of ADR is arbitration (where it is permissible in a consumer context), where an independent third party considers the facts and takes a decision. ADR can sometimes offer a cheaper and faster alternative for consumers and businesses seeking to resolve disputes, in comparison to making a claim to the court.

332. The ADR system was last reviewed during the introduction of the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 ("**ADR Regulations 2015**"). These implemented most provisions of Directive

[41] The statistics cited under "Rationale for intervention" refer to any savings scheme, independent of business size. If one group of consumers were more likely to use schemes by an exempted micro-business, that group of consumers would benefit less from the proposals than suggested by the earlier equalities analysis.

2013/11/EU of the European Parliament and of the Council of 21st May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC. The ADR Regulations 2015 brought about some improvements, such as the Secretary of State for Business, Energy and Industrial Strategy acting as the competent authority for all sectors not covered by specific regulation. This encouraged more consistent ADR provision, including accreditation (albeit non-mandatory) against a defined set of requirements and monitoring against these. However, some structural problems remain, particularly given the voluntary nature of accreditation against the regulations, and new ones have emerged since.

Problem under consideration

333. According to the Consumer Protection Study 2022, over two thirds of consumers (69%) experienced a problem with a product that caused them stress, cost them money, or took up their time.[42] In many cases these problems can be resolved through discussion with the business concerned, but in about a quarter of problem instances the consumer fails to get a satisfactory resolution.[43] Seeking redress via the courts is often an expensive and lengthy process which can deter consumers and therefore leave consumer detriment unresolved.[44] This is especially the case for low-value or minor problems; at least a fifth of consumers who did not pursue a problem have stated this as a reason for not taking businesses to court to settle their dispute. A further third of such consumers were discouraged by the perceived effort and prospects of complaining or not being aware of how to start the process.[45]

334. ADR is usually a cheaper and faster means of resolving disputes between consumers and businesses, compared to going to court, and could be used as a means of seeking redress in many sectors. However, low business and consumer take-up of ADR and continued high detriment in some sectors suggest that there are still problems preventing ADR from reaching its full potential to reduce consumer detriment.[46] The responses to our Consumer Green Paper[47] consultation indicated that these are caused by the following factors:

    a. A difference between sectors in businesses' obligations with respect to ADR and ADR bodies' powers towards businesses, in particular those carrying the name Ombudsman

    b. In some sectors, multiple ADR providers operate in parallel and it can be confusing for consumers to understand why an ADR provider of their choice cannot take on their case and for a business which ADR provider would offer the service best suited to their needs.

    c. The quality of ADR provision varies between providers

    d. ADR providers generally require businesses and consumers to spend up to 8 weeks to try settling a dispute before they would accept a case.

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[42] BEIS (2022): Consumer protection study 2022: understanding the impacts and resolution of consumer problems. https://www.gov.uk/government/publications/consumer-protection-study-2022

[43] Consumer Protection Study 2022. Over half (56%) of the experiences of detriment ended with a positive resolution, where consumers generally received what they asked for, or more. Conversely, in roughly a quarter of detriment incidents consumers did not receive what they asked for or nothing at all. A similar pattern holds when asking directly about consumers' satisfaction with the dispute outcome.

[44] Special Eurobarometer 342 Consumer Empowerment report 2011, page 204. Available at http://ec.europa.eu/consumers/consumer_empowerment/docs/report_eurobarometer_342_en.pdf

[45] BEIS (2022): Consumer protection study 2022: understanding the impacts and resolution of consumer problems. https://www.gov.uk/government/publications/consumer-protection-study-2022 (figure 21)

[46] While comparisons across time are difficult due to differing methodologies, some products and services have consistently ranked highly in consumer detriment estimates, such as telecommunication services and used car purchases.

[47] Department for Business Energy and Industrial Strategy (2018): MODERNISING CONSUMER MARKETS. Consumer Green Paper

335. These causes broadly correspond to the barriers the European Commission has identified to the use of ADR: current coverage is incomplete across sectors, high quality of services is not always guaranteed and consumers lack sufficient awareness of ADR as a means to resolve problems.

A – Different business obligations and ADR provider powers by sector

336. Consumers can find it confusing to navigate the landscape, because sectors differ in the type of service offered. For instance, participation in ADR and compliance with ADR decisions is mandatory for businesses in most regulated sectors, notably financial services, energy, telecommunications, and rail, but is voluntary elsewhere. Also, the dispute resolution methods employed (conciliation, mediation, arbitration etc.) and the cost to the parties involved varies by provider and sector. Even terminology is not a clear guide, as some Ombudsmen have the power to effectively enforce their decisions in a court (e.g. Financial Services Ombudsman, OS: Energy, OS: Communications), while others do not (e.g. The Motor Ombudsman, The Furniture Ombudsman). Finally, ADR schemes are operated under different models. ADR schemes in regulated sectors (financial services, energy, telecommunications etc.) are provided by both public (e.g. Financial Ombudsman Service, Legal Services Ombudsman) and private (e.g. Ombudsman Services[48]) bodies.

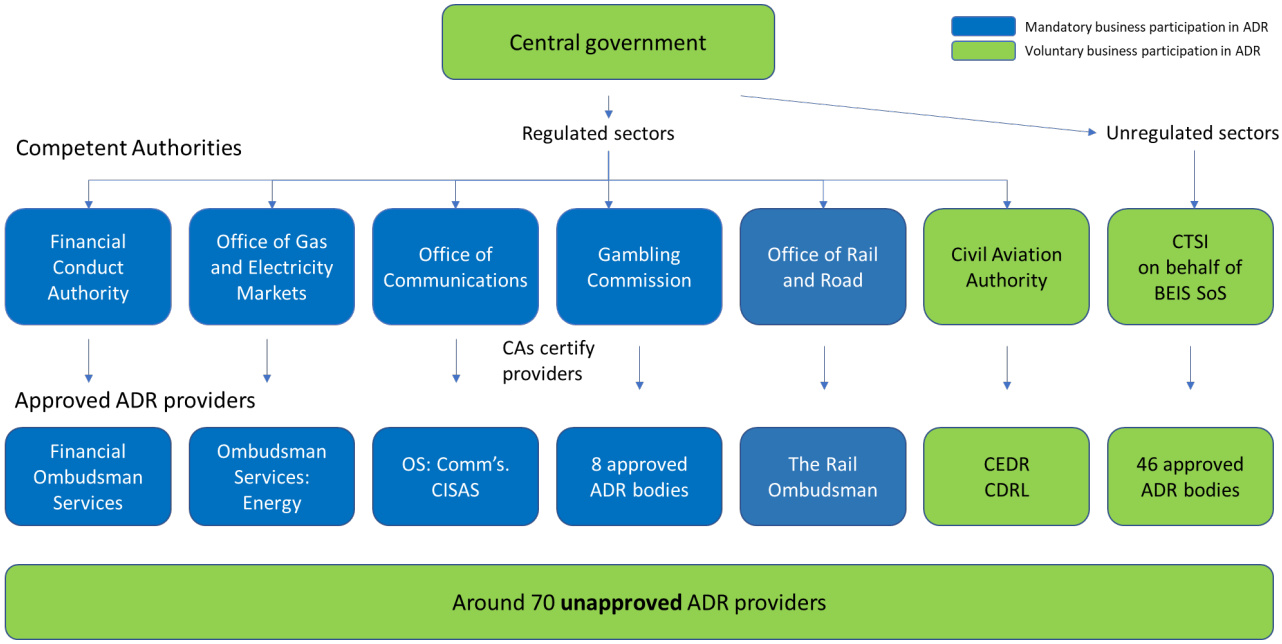
B – Multiple ADR providers per sector

337. As shown in Figure 8, the ADR landscape in the UK currently consists of around 70 providers, which can cause further confusion for consumers and businesses. While in the financial and energy sectors, there is one ADR provider each (Financial Ombudsman Services and Ombudsman Services: Energy respectively), there are two providers in the telecoms sector and at least 20 for the wider home improvement sector and six for the wider motoring sector. Where such choice is available, it is generally the business' decision which provider to use, which can be additionally confusing for the consumer when searching for a party to take their dispute to.[49] The decision of which ADR provider to work with may also not be straightforward for businesses, especially if they do not use ADR regularly.

338. Similarly, several respondents to the 2021 consultation highlighted that this proliferation of ADR providers in non-regulated sectors causes confusion for the consumer. Others, however, highlighted the benefits of competition to drive innovation and lower prices for businesses, if appropriate safeguards and basic minimum standards were put in place and upheld.

[48] Ombudsman Services provides ADR for the energy, telecommunications, property and copyright licensing sectors
[49] All-Party Parliamentary Group on Consumer Protection (2019): Report from the Ombudsman Inquiry
Queen Margaret University and University of Westminster on behalf of Citizens Advice: Confusion, gaps, and overlaps - A consumer perspective on alternative dispute resolution between consumers and businesses.
Which? (2021): Are Alternative Dispute Resolution schemes working for consumers?

Figure 8: Overview of the ADR landscape[50]



C – Quality of ADR provision

339. There were also comments in the 2018 Consumer Green Paper and from subsequent stakeholder engagement on improving the current provision of ADR services and the scope of the current approval and oversight system.

340. ADR providers in the non-regulated sectors are currently accredited by the Government but with assistance from the Chartered Trading Standards Institute (CTSI) . In the regulated sectors, the sectoral regulators act as competent authority and certify ADR providers, but there is variability in the methods and stringency of accreditation and oversight requirements applied. There are also numerous non-accredited and unsupervised providers that currently operate outside of any systematic accreditation or quality monitoring. For example, some trade associations offer dispute resolution on an informal basis as part of a service package to members.

341. DBT research found that 46% of consumers using ADR had problems including the quality and timeliness of communication, customer service or in some cases a perception that the process favoured the business.[51]

342. Many respondents to the Green Paper and the All-Party Parliamentary Group on Consumer Protection's Ombudsman report[52] felt there needed to be a more demanding and consistent minimum set of standards for approval as an accredited ADR provider, and adherence to a code of practice, pointing to the Ombudsman model as the gold standard.

343. These themes are reflected in the 2021 consultation on reforming competition and consumer policy.[53] Specifically, stakeholders felt that ADR standards should be consistent, clear, universally applied and enforced with appropriate sanctions to incentives and drive performance. Many respondents felt more robust initial accreditation

[50] Further acronyms:
CTSI: Chartered Trading Standards Institute
CISAS: Communications & Internet Services Adjudication Scheme
CEDR: Centre for Effective Dispute Resolution
CRDL: Consumer Dispute Resolution Limited

[51] ICF Consulting on behalf of BEIS. RESOLVING CONSUMER DISPUTES: Alternative Dispute Resolution and the Court System. 2018.

[52] All-Party Parliamentary Group on Consumer Protection: Report from the Ombudsman Inquiry. 2019

[53] https://www.gov.uk/government/consultations/reforming-competition-and-consumer-policy/outcome/reforming-competition-and-consumer-policy-government-response

processes and increased reporting requirements would bring improved accountability practices, particularly in the non-regulated sectors. Improved transparency and demonstration of independence were highlighted as areas where more could be done to improve business and consumer confidence in ADR.

Rationale

344. The case for government intervention in ADR provision rests mainly on **information failures**. It can be difficult for a consumer and for a business to identify which ADR provider can deal with a dispute and what they might expect from the process. While such information could be researched with enough time, **bounded rationality** considerations make it likely that many consumers abandon attempts at ADR, if they do not find the required information quickly.

345. **Information asymmetries** are also present. ADR providers know more about the nature and quality of their service in advance, compared to consumers and businesses who may not use the service often. More transparency and better standards could help businesses make more informed decisions about which ADR provider to work with and incentivise ADR providers to compete on price and innovation rather than on (low) quality.

346. Viewed in a wider context, ADR could potentially help consumers to actively challenge businesses to provide value-for-money deals – an important factor for competitive markets.[54]

Options

Retain as is – No changes to ADR regulations

347. One option would be to not make any changes to the ADR regulations or their legislative effect in the expectation that market forces or external factors could address the problems identified earlier. The ADR Regulations 2015 are part of Retained EU Law.

348. We did not consider retention without changes appropriate because it would not achieve the policy objectives, nor would it take advantage of the regulatory opportunities afforded by EU Exit. The requirements on ADR providers would remain in the ADR Regulations 2015 as they are now, as would the (minor) public funding towards the oversight structures. The landscape of ADR providers would remain as it is and we wouldn't expect a change in the ratio of approved to unapproved providers. Consequently, we also wouldn't expect a change in quality or use of ADR or users' confidence in or satisfaction with it.

Sunset the ADR Regulations 2015

349. Sunsetting the ADR Regulations 2015 would likely not improve upon the status quo and not achieve the policy objectives. Our cost-benefit assessment will show how even non-regulatory options that build on the status quo are unlikely to achieve the policy objectives. It is thus likely that a scenario without ADR regulations, for instance a fully non-regulatory mechanism, would also be unlikely to improve upon the status quo.

350. In fact, if the regulations were sunset, we would rather expect an adverse development compared to the status quo: fewer ADR providers would use the current accreditation criteria for their operations, which could impact quality and would further decrease the consistency of standards. This in turn would decrease business and consumer confidence in ADR and discourage their use of it.

[54] Mark Armstrong (2008), 'Interactions between competition and consumer policy'

Preferred policy package

351. **We propose requiring all ADR providers to become and remain accredited to provide an ADR service.** Mandatory accreditation and assessment by a Competent Authority would improve the overall quality and consistency of ADR provision by bringing in to scope all ADR providers that have not sought accreditation previously. Competent Authorities will also have more ways to ensure ongoing compliance with the accreditation standards, further improving ADR quality and consistency. For one, the ability to remove accreditation, in the course of a regular review or of an investigation, would be a stronger sanction towards ADR providers due to its more severe consequences (they would have to stop providing ADR services). Further, we propose giving Competent Authorities civil penalty powers towards ADR providers that could be used earlier in an investigation process because, in the reformed system, removal of accreditation should be reserved for severe and/or protracted instances.

352. Lastly, we also take the opportunity to simplify the requirements that currently exist in the ADR Regulations 2015 where possible, in the proposed Bill. For instance, we will remove a requirement for businesses to signpost to a qualified ADR provider if they are not obliged to use ADR, by law or by contractual terms (such as terms and conditions). Further, we will simplify the information provision requirements on ADR providers: they will now only have to publish an annual report and will no longer have to submit an additional biennial report to the competent authority (although they will be required to provide information to the competent authority when reasonably required).

Alternatives to Regulation

353. We explored the scope for voluntary options and will work to apply them where we find them to be useful. However, as the cost-benefit assessment will set out, we consider non-regulatory options as unlikely achieve the policy objectives.

354. To improve quality, we have been seeking inputs from competent authorities and businesses on how the principles of good ADR provision could be outlined and communicated more clearly. We will also increase the information on ADR available to consumers on the gov.uk homepage linking to consumers advice websites. Further, we are reviewing how to better signpost consumers to the most relevant contacts.

355. Furthermore, we aim to reduce the 8-week period consumers have to wait to access ADR and intend to work with regulators and businesses in regulated sectors to voluntarily agree to reduce the period significantly. However, while this strand of voluntary activity could help encourage more consumers to use ADR, it does not address concerns around the quality of provision or the transparency of the landscape.

356. We have also explored voluntary actions to increase ADR take-up in sectors in which business participation in ADR is not mandatory. For example, government will work with Trade Associations to publicise and promote the availability of ADR to their members. We considered an ADR kitemark could be introduced to create a competitive advantage for businesses who use ADR, but will not take this option forward.

Relevant work outside of this policy package

357. The Ministry of Justice (MoJ) issued a call for evidence on dispute resolution in England and Wales in August 2021.[55] There, the MoJ outlined the case for a higher use of ADR from both a public services perspective (relieving pressure on the courts system) and from a user perspective (many court users would have preferred to avoid court proceedings). The call for evidence's themes mirror some of the problems identified

[55] Ministry of Justice (2021): Dispute Resolution in England and Wales: Call for Evidence. https://www.gov.uk/government/consultations/dispute-resolution-in-england-and-wales-call-for-evidence.

earlier in this section around uptake and engagement as well as quality of ADR providers and the service offered.

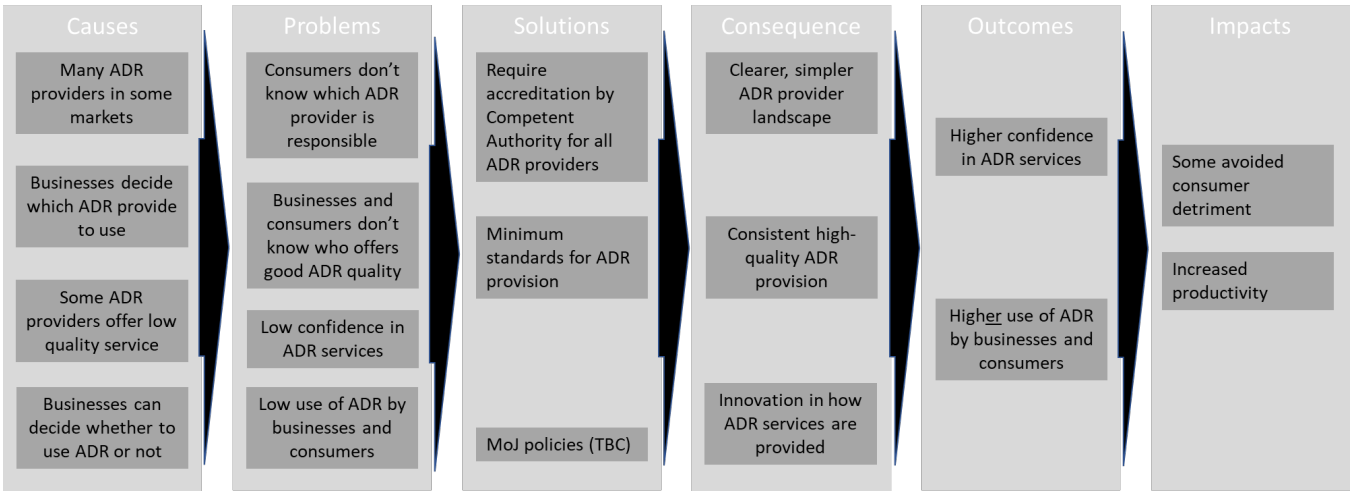
358. This strand of work is still at an early stage, so it is uncertain which policy options the MoJ may take forward or what impacts these may have. However, on a high level and given the MoJ's wider objectives for the project, it would be reasonable to assume *some* positive contribution to consumers' awareness of, satisfaction with, and/or use of ADR.

359. DfT have also recently consulted on reforming aviation consumer policy and a range of air passenger rights issues including introducing mandatory use of ADR for all airlines. DfT are currently analysing responses to this consultation and are yet to publish a response.

Policy objectives

360. The immediate policy objective is to increase the clarity, quality, and innovation in ADR provision. A simpler ADR landscape and more consistent ADR quality is intended to improve consumers' and businesses' confidence in and satisfaction with ADR services. These in turn, potentially supported by MoJ policies, shall increase the use of ADR by encouraging and empowering those consumers to continue resolving problems who would otherwise abandon them, which would reduce *some* unresolved consumer detriment. Finally, as outlined above, we also expect *some* contribution to economic growth through more intense competition. Figure 9 illustrates these considerations.

Figure 9: Logic model for impact of changes to ADR provision



361. In this, the policy also supports DBT's objective to make the UK a great place to start and grow a business by levelling the playing field for compliant businesses and potentially increasing consumer spending in the sectors affected. These policies also address a recommendation that John Penrose MP raised in his report to make ADR services easily and widely accessible to consumers.[56]

Cost-benefit assessment of mandatory ADR provider accreditation and standards

362. Making accreditation mandatory would level the playing field and drive consistency across the sector through the application of a common legal framework around expertise, independence, impartiality, transparency, fairness and annual reporting. In addition, consumers must not be charged more than the nominal fee set out in the clauses (but which may be adjusted by regulations) and ADR officials must possess the necessary skills to be able to carry out their functions competently. Furthermore, making

[56] John Penrose MP (February 2021): Power To The People: Stronger Consumer Choice And Competition So Markets Work For People, Not The Other Way Around.

accreditation mandatory supports our objective to encourage low-cost ADR for businesses whilst ensuring all ADR bodies are providing a consistent minimum standard.

Cost to ADR providers

363. ADR providers may be public or private organisations. In non-regulated sectors, some ADR providers are trade associations who offer this service to their members as part of a range of membership benefits. The main way in which the policy package will impact ADR providers' cost is through requiring all ADR providers to become approved. There may also be some cost implications from our work with regulators to raise quality standards. In aggregate, the costs to ADR providers is the product of the number of ADR providers affected by the changes multiplied by the cost per provider to remain or become compliant. The costs discussed below thus concern the relationship between ADR providers and the competent authorities (see also next section on competent authorities).

Number of ADR providers

364. We do not know how many organisations offer ADR services, because accreditation is not mandatory and there is no register of unapproved ADR providers. A report prepared for Citizens Advice identified 91 unaccredited ADR schemes delivered by 69 ADR providers in 2017.[57] One organisation may run several schemes if they offer ADR for different products or services. For instance, Ombudsman Services offers ADR in energy, telecommunications and some parking services, while the Centre for Effective Dispute Resolution offers ADR for flights, telecommunications and several other services.

365. As a further data source, Resolver has shared a breakdown of how many cases have been escalated to which ADR provider through its portal between 2014 and 2020.[58] The portal recorded disputes being referred to around 94 different domestic ADR providers, including accredited ones. Based on 59 accredited ADR providers (the 46 accredited with CTSI plus further ones for other competent authorities), this data suggests 35 unaccredited providers having offered ADR in the last years. While the demographic of Resolver users is not representative of the UK population, the more than 5m disputes handled through its portal make it unlikely that any large ADR provider is not captured. Any omitted providers would thus likely handle only relatively few cases.

Unit cost for ADR providers

366. We do not hold much information about the cost to ADR providers of becoming and staying approved. From our engagement with ADR providers, the largest component seems to be the cost of initially becoming approved and of participating in regular audits by the competent authority. We have not been able to obtain costs of approval from ADR providers. However, the Chartered Trading Standards Institute have indicated that it would require around eight to ten working days to prepare a provider for approval and then conduct it. We assume that ADR providers incur comparable efforts. The approval itself carries a fee of between £2,500 and £3,000.[59]

367. For the low scenario we therefore assume an accreditation fee of £2.5k and internal cost for an average ADR provider of preparing for and participating in accreditation of £0.9k (8 days x £115 daily rate). The daily cost rate is based on a wage of £13.13 for

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[57] Queen Margaret University and University of Westminster on behalf of Citizens Advice (2017): Overview of ADR Providers
Informing the report: Confusion, gaps, and overlaps - A consumer perspective on alternative dispute resolution between consumers and businesses.
[58] BEIS analysis of consumer complaints data made accessible by Resolver via its Looker platform,
[59] https://www.tradingstandards.uk/media/documents/commercial/adr/ctsi-adr-guidance-brochure-final-15-06-17.pdf

customer services representatives[60], a 17% non-wage labour cost uplift[61], and 7.5 hours for a working day. For the high scenario we assume £3.0k and £1.2k respectively and for the central scenario £2.8k and £1.0k. These are all one-off costs incurred at the start of the appraisal period. These calculations are summarised in Table 8.

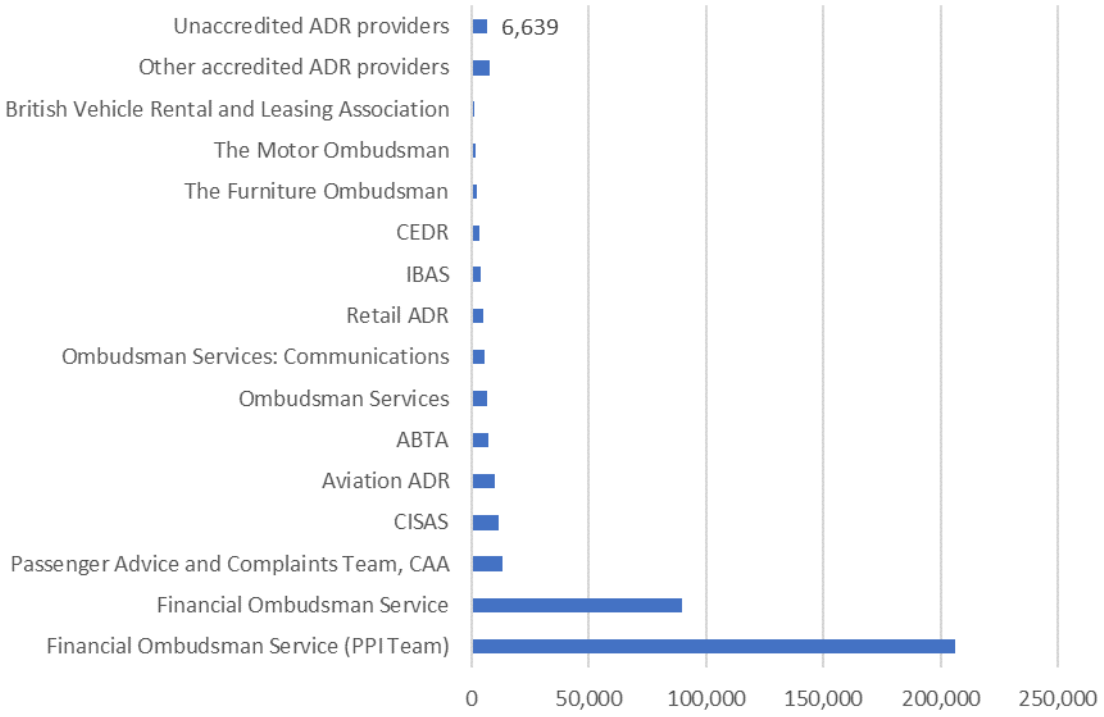
368. As regards annual audits, ADR providers have suggested this may take between 8 and 21 staff days per year to prepare for, participate in, and follow up on. Providers have also indicated requiring an additional ten days to respond to case investigations or bespoke data requests by CTSI. On the other hand, providers felt that a requirement for regular reporting did not represent notable additional cost, because this would merely summarise information which they collect regardless to steer their operations.

369. Using the same daily cost rates, we thus assume an annual additional cost to each newly accredited provider of between £2.1k (8 + 10 days x £115 daily cost rate) and £3.6k (21 + 10 days x £115 daily cost rate), with the central cost being the average of those values at £2.8k. Currently unaccredited providers could also incur costs of having to leave the market, mainly in the form of lost revenue from stopping ADR activities. This would happen if the additional compliance costs exceeded any profits from offering ADR services. Barring any significant exit costs (e.g. staff severance payments, selling assets), the impact on unaccredited ADR providers can thus not be higher than the compliance cost – and may be lower for market exists involving very low levels of activity. We therefore regard the above costs as cautious estimates.

370. To further underline this point, we use information gathered via Resolver's platform. Figure 10 below shows the number of cases recorded by Resolver as having been referred to an ADR provider since the portal's launch in 2014 until February 2021. In line with administrative data from ADR providers, a large majority of ADR cases relate to financial services, specifically Payment Protection Insurance disputes. Out of a total circa 380,000 cases escalated to ADR over the period, around 6,600 were taken by unaccredited ADR providers – or just under 1,000 cases out of circa 55,000 recorded total ADR cases on average per year. While it is likely an incomplete picture based on a biased sub-sample of the population, Figure 10 still gives an order of magnitude and suggests that all or most unaccredited ADR providers likely handle relatively few cases.

[60] Based on 2021 ONS data from the Annual Survey of Hours and Earnings (ASHE)
[61] Based on 2021 ONS data from the Index of Labour Cost per Hour (ILCH)

Figure 10: No of Resolver cases referred to ADR, by ADR provider (2014 - 2020)



371. Similar to the additional approval fees, an increase in the number of accredited ADR providers would also increase oversight cost by the competent authority. As per a later section (Cost to government), we expect these to be between £0.1m and £0.2m and borne by ADR providers. As with the other costs, some of these may be passed on to businesses participating in ADR schemes.

372. The new code of conduct may impose additional costs and workload on ADR providers compared to this assessment's calculations which are based on current practice and requirements. However, in the absence of evidence we assume this effect to be small and have not quantified it.

373. The simplification of ADR providers' reporting requirements towards competent authorities should lessen the administrative burden and save them costs. However, we expect this impact to be small and have not been able to quantify it.

Aggregate cost to ADR providers

374. Table 8 summarises these assumptions and presents cost estimates for the different scenarios. The scenarios differ in the number of unaccredited ADR providers assumed to currently operate and the unit cost assumptions for the different compliance activities. We expect that these costs are partly or fully passed on to businesses in the form of higher fees for ADR services. Given that mandatory accreditation is, in principle, separate from mandatory business participation in ADR, this is an additional cost on business.

Table 8: Aggregated compliance cost to ADR providers

	Unit	Central	Low	High
Unaccredited ADR providers	[No.]	69	35	91
Competent authority approval fee	[£k]	2.8	2.5	3.0
Days required for approval	*[days]*	*9*	*8*	*10*

Cost rate per day	*[£/day]*	*115*	*115*	*115*
Internal cost for approval per provider	[£k]	1.0	0.9	1.2
One-off cost to become accredited	**[£m]**	**0.3**	**0.1**	**0.4**

	Unit	Central	Low	High
Newly accredited ADR providers	[No.]	69	35	91
Days required for annual audit	*[days]*	*15*	*8*	*21*
Days required for case investigations and ad hoc queries	*[days]*	*10*	*10*	*10*
Annual audit cost per newly accredited ADR provider	[£k]	2.8	2.1	3.6
Annual audit cost for all newly accredited ADR providers	[£m]	0.2	0.1	0.3
Recharge to ADR providers of higher costs incurred by competent authority	[£m]	0.2	0.1	0.2
Total additional annual cost	**[£m]**	**0.4**	**0.2**	**0.6**

Cost to businesses

375. We expect only negligible impacts on businesses from these regulatory changes. ADR providers may need to pass on some of the higher cost from additional auditing, case investigations and other activity to comply with higher standards. However, these tend to be fixed costs and their impact when spread over many cases is likely low. Further, business participation in ADR remains voluntary in non-regulated sectors, so businesses can avoid this cost.

376. While businesses may benefit from the deregulatory clauses of these changes, such as the abolishment of the sign-posting requirement, the impact per business is likely too low to generate notable aggregate benefits.

Cost to government

377. Because some ADR providers are private organisations, e.g. trade associations, it is appropriate that an independent competent authority approves ADR providers and oversees their continued adherence to quality standards. Such bodies are typically funded by the government, though they may also partly fund themselves through fees for their services.

378. Based on our engagement with different competent authorities (CAs) under the existing regulations, the cost of approval and oversight consists primarily of staff costs and, if the competent authority uses them, periodic external reviews. Costs are driven by the number of ADR providers under the remit and the kind of activities performed, which include regular reviews of key performance indicators, on-site or desk-based process

audits, and initial process and compliance audits. The frequency of these activities differs across CAs. For instance, most CAs in the regulated sectors receive and review KPI information quarterly, compared to CTSI which generally receives only annual information, except in cases of concern. On the other hand, CTSI visits ADR providers' sites annually to review processes, random case samples, training programmes and others, whereas the regulators mostly rely on external reviews for this.

379. In terms of cost and resources, DBT currently funds CTSI at around £120,000 (incl. VAT) and CTSI have allocated two staff for approval and oversight tasks for 46 ADR providers. This compares to around 1.5 FTEs in Ofcom, for instance, who oversee 2 ADR providers. For all scenarios we assume that the need for staff and cost increases in proportion with the number of ADR providers overseen (see previous section). Importantly, we assume that the additional requirements on standards do not increase the costs of oversight, compared to the status quo. Table 9 shows that this results in between £0.1m and £0.2m additional costs for the competent authority function. To the extent that some currently unaccredited ADR providers exit the market, these costs are an over-estimate.

Table 9: Cost of ADR provider oversight

	Unit	Option 2 – central	Option 2 - low	Option 2 - high
Newly accredited ADR providers	[No.]	69	35	91
Additional FTEs	[No.]	3.0	1.5	4.0
Total additional cost of approval and oversight tasks	[£m]	**0.2**	**0.1**	**0.2**

380. However, we expect no net financial impact on the competent authority function (and thus on government), because the competent authority will receive more flexibility to set fees for its services. We expect the above higher costs to be recovered fully from ADR providers, as previewed in the previous section.

Benefits to consumers

381. The most immediate benefit for consumers from these reforms is more consistence in the quality of ADR provision. The reforms shall ensure that all ADR providers are accredited and held to account on a common framework of standards and so avoid consumers being frustrated by a lack of thoroughness or clarity in and communication around the investigation. Further, a simpler landscape with fewer but more established ADR providers shall make it easier for consumers to understand who would take on their dispute and why.

382. As the reforms bed in, more consumers may get access to ADR from businesses becoming more confident in the service and signing up voluntarily.

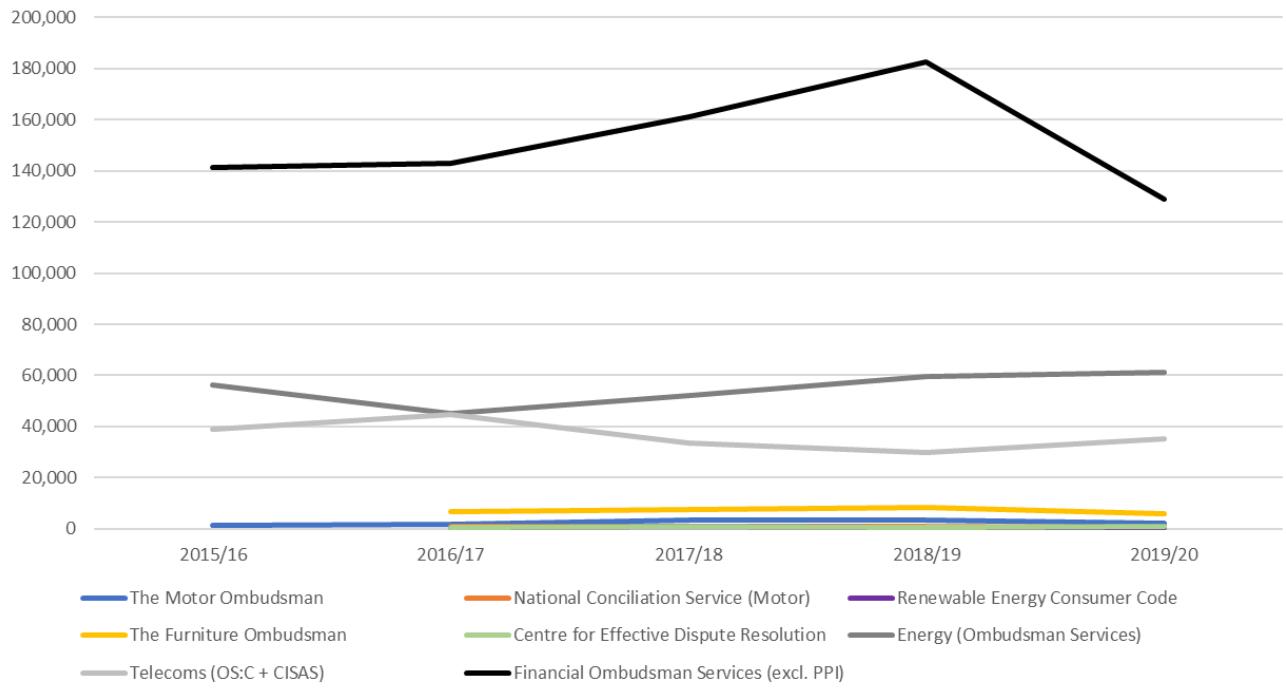
383. Unfortunately, we have not been able to quantify these benefits. It would likely require extensive research to measure ADR quality robustly (if possible at all) and further research to understand the value that consumers place on different levels of ADR quality. The impact of the reforms on ADR take-up is likely too indirect (and small) to attribute robustly to the reforms.

Cost-benefit assessment of non-regulatory options

384. There are limits to the scope and effectiveness of the non-legislative options to improve ADR quality and simplify the landscape. Firstly, ADR providers who consciously compete on a low-cost-low-quality model would be unlikely to become accredited or raise standards voluntarily. Further, even if providers signed up to guidance or code of best practice voluntarily, adherence to it would not be enforceable without legislation and providers could choose to leave the code rather than implement improvements. This message was also conveyed by some stakeholders' responses in the 2021 consultation. Finally, trusted, consistent and reliable consumer ADR would support the MoJ's emerging work to increase the use of ADR.

385. Regarding non-regulatory options to increase business and consumer use of ADR, our stakeholder engagement suggests that businesses see only limited competitive advantages to offering ADR. This suggests that businesses have little incentives to participate in ADR voluntarily and there is thus limited room for growth in ADR use. This theoretical argument is supported by the available data, which suggests large and persistent differences between sectors with mandatory business participation and those without (see Figure 11 below).

Figure 11: No. of consumer disputes accepted by ADR entities per schedule 5 of ADR 2015 regulations



Small and micro business analysis

386. As mentioned, we expect no direct and only negligible indirect impacts on non-ADR businesses from these changes, so a wider small and micro business analysis is not relevant. We believe that most ADR providers are either small or micro businesses due to the number of cases they process and the average cost to manage a case, in line with the assumptions outlined above. This would apply especially for unaccredited providers. However, ADR services may be only a (small) part of some organisations' wider activities, e.g. for trade associations.

387. While we do not expect a disproportionate absolute impact on small and micro ADR providers from the reforms, they may find compliance more challenging if the same tasks have to be performed by fewer staff. We have chosen not to offer any mitigations or

exemptions because exits by smaller ADR providers would support the policy objective of a simpler landscape with clearer service coverage for businesses and consumers.

Equalities and consumer vulnerability analysis

388. We have only limited data on different consumers' awareness or use of ADR or how they are affected by detriment in these sectors:

- **Age**: The 2018 ICF research found that 69% of sampled ADR users were 50 years or older – a far higher proportion than in the general UK adult population.[62] Interestingly, it is also higher than the 48% of court users in the sample that were over 50 years old. In contrast, a survey by Populus for Which? magazine found that around 20% - 22% of respondents aged 35 – 44 or over 55 had previously used ADR, compared to 8% - 17% for respondents in other age categories.[63] On the other hand, the Consumer Protection Study 2022 found little differences across age groups in whether consumers used dispute resolution to address the issue. According the 2020 BEIS Public Attitudes Tracker, 40% of respondents aged 16 to 24 were aware of the term 'Consumer Dispute Resolution', compared to 75% of those over 55.
- **Gender**: a survey by Populus for Which? magazine found no notable differences between genders in their prior use of ADR for consumer disputes (18% vs 17%).[64] Similarly, the 2020 BEIS Public Attitudes Tracker did not find any notable differences in awareness of 'Consumer Dispute Resolution' (65% vs. 66%). This is also reflected in the Consumer Protection Study 2022 which found that 4% of women and 5% of men used a dispute resolution service to address a consumer problem.
- **Disability**: According to the 2020 BEIS Public Attitudes Tracker 75% of households who had at least one member with a disability or long-standing illness were aware of 'Consumer Dispute Resolution', compared to 64% without such members.
- **Families**: the 2020 BEIS Public Attitudes Tracker found that around 62% of households with children were aware of 'Consumer Dispute Resolution' compared to 67% of households without children. By contrast, the Consumer Protection Study 2022 found no statistical difference between family size or presence of children in the household, and the likelihood of using dispute resolution services.
- **Marriage/civil partnership:** However, the Consumer Protection study found that separated/divorced respondents were statistically more likely (8%) and widowed as well as single respondents less likely (1% and 3% respectively) to use dispute resolution.
- **Social grades**: A survey conducted by Populus for Which? magazine found that 80% of respondents who belong to AB social grades were very or somewhat familiar with the term 'Ombudsman', compared to 63% for DE social grades.[65] [66] However, the same survey found very little difference between social grades in use of ADR – only the C2 group showed a moderately higher use (21% vs 17%).

[62] ICF Consulting on behalf of BEIS. RESOLVING CONSUMER DISPUTES: Alternative Dispute Resolution and the Court System. 2018
[63] Populus on behalf of Which? magazine. ADR research. March 2017
[64] Populus on behalf of Which? magazine. ADR research. March 2017
[65] Populus on behalf of Which? magazine. ADR research. March 2017
[66] Social grade A: Higher managerial, administrative and professional
Social grade B: Intermediate managerial, administrative and professional
Social grade C1: Supervisory, clerical and junior managerial, administrative and professional
Social grade C2: Skilled manual workers
Social grade D: Semi-skilled and unskilled manual workers
Social grade E: State pensioners, casual and lowest grade workers, unemployed with state benefits only

This is line with the Consumer Protection Study 2022 which found no statistical differences between different social groups in their use of ADR to resolve consumer disputes. The 2020 BEIS Public Attitudes Tracker found relatively little differences in awareness of 'Consumer Dispute Resolution' between social grades: 68% for AB, compared to 62% for DE.

- **Ethnicity**: The Consumer Protection Study 2022 found that consumers with 'Any other White', 'Mixed or multiple ethic groups', and 'Black or Black British' backgrounds were more likely to have used ADR to resolve disputes (8%, 12% and 15% respectively) compared to those with 'White British' and 'Asian or Asian British' backgrounds.
- **Education**: the ICF research found that 66% of ADR users had a degree level qualification.[67] The Consumer Protection Study 2022 found a more complex pattern in that respondents with A levels as their highest qualification were less likely to use ADR compared to those with university degrees (or equivalent) and those with vocational qualifications or below A levels.

389. We are not aware of relevant data that differentiates consumer detriment in these sectors or awareness or use of ADR by the other protected characteristics: religion/belief, sexual orientation, gender reassignment, or maternity/pregnancy though we did provide evidence on household structures.

390. Table 10 summarises the above findings: the evidence suggests that age, disability, family status and potentially social grade can play a role on how aware people are about ADR. Marriage/ civil partnership, ethnicity, education and potentially age have associated with differential use of ADR. Curiously, age and household size have both been show to influence awareness of ADR but not necessarily its use.

Table 10: Notable differences in awareness and use of ADR by different population groups

Socio-demographic variable	Awareness of ADR	Use of ADR
Age	☒	Mixed results
Gender	☐	☐
Disability	☒	N/A
Family	☒	☐
Marriage/civil partnership	N/A	☒
Social Grade	Mixed results	☐
Ethnicity	N/A	☒
Education	N/A	☒
Other characteristics	N/A	N/A

Monitoring and evaluation

391. We intend to monitor the information collected from ADR entities relating to case duration, but also the number of cases accepted, rejected and closed. Implicitly, this includes an overview of how many ADR entities are accredited to competent authorities and what services they offer in which sectors.

[67] ICF Consulting on behalf of BEIS. RESOLVING CONSUMER DISPUTES: Alternative Dispute Resolution and the Court System. 2018

392. As mentioned, it is difficult to measure the quality of ADR services independent from the outcome of decisions. We intend to liaise with competent authorities to understand and monitor how they ensure quality of ADR provision and compliance with standards and their conclusions. However, we do not see proportionate ways to gather objective and comparable evidence on ADR quality.

Retaining consumer protections from unfair business practices

Background

393. The Consumer Protection from Unfair Trading Regulations 2008 (CPRs) are a critical part of the domestic consumer protection framework. The CPRs define certain commercial practices as unfair, if they would affect the transactional decision made by the average consumer due to:

- misleading statements or actions;
- misleading omissions;
- aggressive practices (as defined in the CPRs).

Additionally, a commercial practice is unfair if it:

- materially distorts the consumers' economic behaviour when the requirements of professional diligence are contravened, or
- is among the list of 31 practices which are automatically unfair without the need to prove an impact on consumer behaviour (schedule 1 - 'the blacklist')

Box 1 – Examples of unfair commercial practices

To illustrate the type of problems addressed by the CPRs, below are some examples of past enforcement of the CPRs:

- Halting the unauthorised sale of tickets to the London Olympics, via an interim civil court order and undertakings given by the enforcement subjects to the CMA.
- Successful prosecution of 9 individuals for organising and/or promoting a pyramid promotional scheme involving over £20 million, resulting in 6 months imprisonment for some of the individuals."

Some examples from the list of automatically unfair business practices should provide further clarity on the CPRs' remit and value:

- Falsely claiming that a product is able to cure illnesses, dysfunction or malformations. (Item 17)
- Describing a product as 'gratis', 'free', 'without charge' or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item. (Item 20)

394. The impact of unfair commercial practices (UCP) can include consumer detriment, for instance because a product did not perform as advertised or because a consumer was misled into purchasing something unsuitable.

395. The powers to investigate potential infringements and enforce the CPRs are contained in the Enterprise Act 2002 and Consumer Right Act 2015. Several organisations, including the CMA and local trading standards services, can investigate potential infringements to the CPRs, though currently only a court can determine that a term or practice is unfair. If a commercial practice is found to be unfair, the business can be directed to stop them and be subject to civil and criminal penalties.

Problem and rationale

Overview

396. The CPRs implemented the European Union's Unfair Commercial Practices Directive (UCPD). They therefore form part of Retained EU law (REUL) and are subject to the sunsetting provisions of the Retained EU Law (Revocation and Reform) Bill. Therefore, without active transposition into UK law, the CPRs would cease to have effect from 1 January 2024. Consumer protection from unfair commercial practices would be at risk of lacunae. This situation would put consumers at greater risk of exploitation by businesses that mislead consumers, make it harder for honest traders to compete on a level playing field, and reduce economic growth through lower consumer confidence and allocative efficiency.

Market failures

397. The main market failure that the CPRs seek to address is **asymmetric information**. Asymmetric information is a situation where one party to a contract knows more about the transaction than the other party. A commonly cited example is used cars for which sellers will typically know their quality, whereas many buyers do not because they have no way of differentiating a good- from a poor-quality car reliably.

398. The CPRs include prohibitions on businesses from misleading consumers by omitting information or providing false information. Without such regulation, businesses could increase profits by misleading consumers regarding products' features (e.g. quality, durability, performance), the commitments that the consumers enter into (e.g. price, contract length), or other relevant contractual elements. Businesses would be particularly incentivised to mislead consumers in cases where consumers have limited knowledge about the product, e.g. because it is a rare purchase or where there are few or no alternative ways to learn about the product features such as for customised products or services.

399. Behavioural biases like **myopia** may be relevant for aggressive sales practices. Consumers may in the moment prefer to avoid a cost today (the emotional and/or time cost of asking an aggressive vendor to leave without having purchased something) without being able to factor in/ appreciate adequately that this comes at a future cost (the price of a product that they may not want or need).

400. Without regulation, consumers and law enforcers would not be able to hold traders to account for their practices. Businesses could more legitimately make profits by misleading consumers, which would weaken incentives to compete on price or quality, in particular when there was no effective way to demonstrate product quality to consumers.[68] This would harm consumers' confidence when purchasing goods and services, which may result in them deferring or cancelling purchases, sticking with tested brands and traders instead of trying out cheaper alternatives, or not being able to buy products because their funds had been spent on aggressively sold products. These

[68] See "signalling theory", e.g. Spence, M. (1974): Market Signaling or Hungerford, T. and Solon, G. (1987): Sheepskin effects in the returns to education.

changed business and consumer behaviours would lead to an equilibrium of low confidence, low spending, and low productivity.

Evidence base

401. Unfair commercial practices are widespread: Table 11 below shows that **between one in ten and three in ten UK consumers experienced different types of unfair commercial practices** from domestic traders. The most common unfair commercial practices were false limited offers (experienced by 29.7% of UK consumers) and persistent sales calls (24.3%).[69]

Table 11: consumers' experience of different unfair commercial practices

Type of UCP	Share of UK consumers experiencing practice in 2018
False limited offers	29.7%
Persistent sales calls	24.3%
Other UCPs	21.4%
Unanticipated extra charges	16.0%
False free products	15.8%
Unfair terms and conditions	15.2%
Lottery scams	9.8%

402. UK evidence further suggests that unfair commercial practices are prevalent and cause harm. According to the Consumer Protection Study 2022**, around £18 billion of net monetised detriment experienced by consumers was due to problems associated with unfair commercial practices**, out of a total circa £54 billion of net monetised detriment**.**[70] The study also suggested the potential value of robust consumer legislation against unfair commercial practices. **Consumers reported having received refunds, repairs, and replacements worth around £15 billion from problems with unfair commercial practices.**[71] Some of these refunds may have been issued even without underlying legislation, e.g. by businesses who recognised they had made a mistake or who wanted to retain customers through good customer service.[72] Further, the study relied on consumers' interpretation of issues, meaning some problems may not have been found to be CPR infringements, if pressed for a legal resolution. However, around £7 billion of the above £15 billion of refunds, repairs, and replacement related to problems with unfair commercial practices that the consumer spent five or more hours to resolve.[73] Assuming that the trader likewise spent non-trivial effort in dealing with the

[69] Consumers, Health, Agriculture and Food Executive Agency (Chafea) on behalf of the European Commission (2018): consumers' attitudes towards cross-border trade and consumer protection
[70] BEIS calculations of Consumer Protection Study 2022 micro data.
Of the eight problem types queried in the survey, three are within scope of unfair commercial practices: misleading information; unfair or unclear terms and conditions; and misleading prices.
Problem types were a multiple-choice question. Therefore, the responses from the report's figure 15 cannot be added up for a total across the three unfair commercial practices.
[71] BEIS calculations of Consumer Protection Study 2022 micro data.
[72] Most instances of refunds are likely due to at least some trader goodwill. In only 1% of problems where the consumer acted on the problem did they take legal action against the seller and in only 3% of instances did they use a dispute resolution service. In contrast, in over 4 in five cases the action taken was to contact the seller directly.
[73] BEIS calculations of Consumer Protection Study 2022 micro data.

complaint and thus didn't immediately refund the consumer, the CPRs are likely to have played a significant role in ensuring that consumers got redress.

403. Robust legal protections against unfair commercial practices benefit not only consumers but also businesses that adhere to the law. As shown in Table 12, **between around 9% and 31% of UK retailers observed their domestic competitors engage in different unfair commercial practices**.[74] More broadly, the study found that almost four in five UK retailers (77.5%) thought that their domestic competitors complied with consumer protection legislation.[75] So, while more could potentially be done to strengthen and increase enforcement of consumer protection regulation (see also the section on "Strengthening consumer enforcement powers" earlier in this document), the CPRs' existence likely incentivises some businesses to comply. Similarly, the absence of such legislation could increase the prevalence of unfair commercial practices and weaken competition.

Table 12: businesses' experience of different unfair commercial practices

Unfair commercial practice	Share of UK businesses reporting UCP in 2018
Pressuring consumers with persistent commercial calls or messages	31.2%
Writing fake reviews which are in fact hidden adverts or hidden attacks on competitors	26.3%
Advertising falsely that a product is available only for a limited period	25.2%
Offering products as free of charge even if they actually entail substantial charges	14.3%
Other unfair commercial practices	13.1%
Sending unsolicited products to consumers, asking them to pay for the products	8.9%

404. The evidence suggests that few businesses consider consumer protection regulation in general to be overly burdensome. Around four in five UK businesses (79.6%) found it easy to comply with consumer legislation in their sector and roughly three in four (75.3%) agreed that the costs related to compliance with consumer legislation was reasonable.[76]

405. Protections against unfair commercial practices, and consumer rights in general, play an important role in supporting economic growth. On the demand side, they improve consumer confidence and allow consumers to fulfil their role of challenging businesses to provide good value for money. On the supply side, they improve businesses' confidence that they will not be undercut by a rival that exploits consumers' behavioural weaknesses, and so incentivise businesses to compete on price, quality, and/or innovation.

406. A BIS-commissioned literature review found strong evidence that simplified and consolidated consumer law leads to more confident and empowered consumers and some evidence of a link to economic growth.[77] However, the study highlighted the

[74] Research by Kantar Public for the European Commission (2018): Retailers' attitudes towards cross-border trade and consumer protection 2018.
[75] Research by Kantar Public for the European Commission (2018): Retailers' attitudes towards cross-border trade and consumer protection 2018
[76] Research by Kantar Public for the European Commission (2018): Retailers' attitudes towards cross-border trade and consumer protection 2018.
Both questions used a Likert scale and had a neutral option. The statistics therefore do not mean that 20% and 25% of businesses found it difficult and costly respectively to comply.
[77] ICF GHK (2013): Consumer rights and economic growth

measurement challenges to quantify the relationship between inputs and outcomes. The CMA's impact assessments have found consumer benefits (intermediate outputs) of its consumer law enforcement actions of around £99 million per year since 2014.[78] Further, a 2019 EU report quantified benefits of consumer regulation on GDP and employment.[79]

407. Some trade agreements signed by the United Kingdom with other countries require the UK to maintain certain measures for consumer protections against unfair commercial practices. The CPRs are part of how the United Kingdom currently meets such international law obligations. Any alternate legislation would need to consider whether it is compliant with international law obligations.

Policy options

408. As with most other REUL, the following broad policy options exist for the CPRs:

a. Repeal/ sunset

b. Reform

c. Retain as is, potentially with minimal changes

Repeal/ sunset

409. As outlined above, the CPRs are an important component of UK consumer protection law. Repealing or sunsetting them would therefore risk harming consumers and compliant businesses as well as undermining economic growth. Further, repealing or sunsetting the CPRs could conflict with trade agreements that the UK signed with other countries. We therefore do not consider it a viable or beneficial option.

Reform

410. Government, enforcement bodies, and other stakeholders consider the CPRs to generally work well. The principles-based approach makes them flexible and somewhat future-proof. The list of banned practices (Schedule 1) are serious and removing entries would send a poor signal to traders and make these practices harder to enforce. Some newer forms of consumer harms (e.g. fake reviews) have emerged since the CPRs were created which are not on Schedule 1. However, these developments do not require a wholesale reform of the CPRs. Instead, we are including a Delegated Power in the Bill to amend the list of automatically unfair commercial practices (Schedule 1). We expect to use this power to add the writing or commissioning of fake online reviews to the Schedule 1 list. Such a change would be substantial but is out of scope of this section. The impact of adding fake reviews to the blacklist will be covered in the next section of this document. Outside of this and potential similar cases like reviews in the future, we see no case for radical structural changes to the CPRs.

Retain

411. Our preferred policy approach is therefore to retain the legislative effect of the CPRs by re-writing them into the DMCC Bill. Based on engagement with enforcement body officials and analysis of the regulations and case law we have identified some instances where the regulations could be simplified, clarified, or aligned with other UK law without changing their meaning. Broadly, the changes fall in the following categories:

- **Technical and reference changes**, for instance removing references to the European Economic Area in some Schedule 1 items or updating the reference to

[78] See earlier section "Strengthening consumer enforcement powers" of this document for details.
[79] Bukowsi, M. and Kaczor, T. (2019): Contribution to Growth: Consumer Protection - Delivering economic benefits for citizens and businesses

the Northern Ireland Department of Enterprise, Trade and Investment by the Department for the Economy.

- **Alignment of certain definitions**, e.g. 'consumer' and 'trader', with the Consumer Rights Act 2015, to simplify consumer protection law overall through consistency of definitions.
- **Revised structure** for the CPRs overall or the content of individual clauses. One example is that the public enforcement section now follows the prohibitions section as public enforcement applies to the prohibitions as a whole. Another example of this type of change is that the sequence of Schedule 1 practices has been reordered to group similar practices together. These kinds of changes should produce a more logical sequencing of clauses throughout the CPRs and make them easier to follow and comprehend for consumers and traders.
- Where possible, some similar clauses were **merged** while preserving the overall meaning of the previous individual clauses.
- **Clarifications**: for example, the description of 'commercial practice' will be clarified to more explicitly include facilitating the promotion, sale or supply of a product to or from consumers. The CPRs currently refer to activities directly connected with promotion, sale or supply of a product to or from consumers. The updated definition will more explicitly capture the activities of platforms that host content from third party traders. Another example includes a clarification that consumers may be vulnerable not only due to their personal characteristics but also because of the circumstances they are in, e.g. bereavement. This better reflects recent work by regulators which improved our understanding of consumer vulnerability. Overall, these two and other clarifications should express the legislative intent of the CPRs more clearly and so improve comprehension and compliance.

412. The above list is illustrative rather than exhaustive. However, it gives a sense of the type of changes being implemented and underlines that the way the legislative effect of the CPRs is to be retained means that there is broadly no change to the effect of the regulation or to businesses' obligations from CPRs. Only very few businesses are therefore expected to incur (likely minor) additional costs to comply and we expect only minor aggregate impacts from these changes.

Cost benefit analysis

413. In line with guidance, we will analyse the impacts of retaining the CPRs in relation to the status quo, rather than a scenario in which the CPRs cease to have effect as a result of the sunset provision.

Familiarisation cost

414. While the obligations on businesses from the CPRs will remain largely unchanged, the regulations will be rewritten into UK law in full and so present new legal text that businesses may want to familiarise themselves with. This applies particularly for clarifications of existing provisions or where the legislation has been simplified.

415. We follow a similar approach to previous impact assessments for the Consumer Rights Act 2015 and the original CPRs in 2008 to calculate familiarisation cost. We assume that all businesses in the following 2-digit and 4-digit SIC codes are in scope and will familiarise themselves with the rewritten CPRs:

- 45: Wholesale and retail trade and repair of motor vehicles and motorcycles
- 47: Retail trade, except of motor vehicles and motorcycles
- 4910: Passenger rail transport; interurban

- 4931: Urban and suburban passenger land transport
- 4932: Taxi operation
- 4939: Other passenger land transport n.e.c.
- 4942: Removal services
- 5010: Sea and coastal passenger water transport
- 5030: Inland passenger water transport
- 5110: Passenger air transport
- 55: Accommodation
- 56: Food and beverage service activities
- 58: Publishing activities
- 5913: Motion picture; video and television programme distribution activities
- 5914: Motion picture projection activities
- 5920: Sound recording and music publishing activities
- 60: Programming and broadcasting activities
- 61: Telecommunications
- 87: Residential care activities
- 90: Creative, arts and entertainment activities
- 91: Libraries, archives, museums and other cultural activities
- 93: Sports activities and amusement and recreation activities
- 96: Other personal service activities.

This amounts to around 1.3 million businesses, 1.2 million of which are micro businesses (fewer than 10 employees).[80]

416. Consistent with our approach to the impact of subscriptions in this bill, we assume that for micro businesses and small businesses one and two owners/managers respectively will review the changes, at a cost rate of £25.75 per hour.[81] For medium and large businesses, we assume that an additional 10 and 20 customer service staff respectively will review the changes, at a cost rate of £12.47 per hour.

417. Staff across all business sizes will need the same time to familiarise themselves with the changes. As a low estimate, we consider 30 minutes sufficient to understand the update because large portions of the CPRs remain effectively unchanged and because summaries and hosted events by government, regulatory bodies/enforcers, or trade associations should adequately explain what businesses need to know. As a high estimate, we assume that each person who needs to understand the update will read the rewritten CPRs in full. We expect them to run to at most 9,000 words. Using an average reading speed of 75 words per minute for complex, technical material, this suggests two hours necessary to read and understand the new clauses.[82] Our central estimate is the average of the two figures – 75 minutes.

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[80] For 2 digit SIC codes - BEIS: business population estimates for the UK and regions 2021, table 6.
For 4-digit SIC codes: ONS IDBR 2021 – table 4, uplifted by a scaling factor that compares IDBR and BPE figures on a 2-digit SIC code level.

[81] The estimated hourly cost uses the gross hourly wages as reported in ONS Annual Survey of Hours and Earnings plus a 17% non-wage uplift to reflect the cost of national insurance, pension contributions, etc.

[82] EFTEC (2013), "Evaluating the cost savings to business from revised EA guidance – method paper", quoted through BEIS (2016): Business impact target – appraisal of guidance: assessments for regulator-issued guidance.

418. Table 13 summarises these calculations. Total familiarisation costs range between around £19 million and £74 million with a central estimate of £47 million. In all cases, most of the cost comes from micro businesses due to their large number.

Table 13: business familiarisation cost for writing CPRs into UK law

Business size	No. of businesses [m]	Low cost [£m]	Central cost [£m]	High cost [£m]
Micro	1.22	15.7	39.3	62.8
Small	0.07	1.8	4.5	7.2
Medium	0.01	0.8	2.0	3.1
Large	0.00	0.3	0.8	1.2
Total	**1.30**	**18.6**	**46.5**	**74.4**

Ongoing cost

419. As detailed above, the proposed changes are mostly to simplify the CPRs and to clarify their legislative intent in the light of experience of their application. It is possible that the rewritten CPRs may prompt some businesses to change a practice. For instance, the greater clarity on the legislative effect of the CPRs may help businesses understand their duties better and change practices that they had not previously considered in scope. Such cases would represent a movement from non-compliance into compliance and any business costs associated with them would be excluded from the EANDCB. Given the nature of these proposed changes, we expect only very few edge cases (if any) where a business practice would become unfair that would not currently be regarded as unfair. Indeed, there may even be an ongoing saving for businesses from finding the CPRs easier and quicker to understand and implement, for instance for new businesses or those who review consumer law regularly as part of standard processes.

420. One instance that could see some requirement for businesses to change practices is the clarifications, in particular the way that online platforms are more explicitly included in the ‘commercial practice’ definition. However, the current drafting of the CPRs should be interpreted to mean that CPRs already apply to platform-operating businesses in line with UCPD guidance, which is clear that the facilitation by platforms of a 'commercial practice' is not excluded from the scope of the CPRs.[83] There should therefore be no additional costs for firms already complying with the CPRs.

421. In sum, we thus expect limited impacts on businesses’ ongoing operating costs.

Small and micro business analysis

422. As shown in the previous subsection, micro businesses will incur the majority of the familiarisation cost. This is due their large number (1.2m out of a total 1.3m businesses in scope). We estimate the cost per micro business to range between £13 and £52, compared to between around £150 and £600 per large business. To the extent that businesses overall incur ongoing compliance cost, we have no reason to assume or expect that a smaller business will be more likely to be affected. We do not know whether compliance cost for small and micro businesses would be higher than that of large businesses, relative to revenue or staffing levels, if the greater clarity of the CPRs motivated them to change a business practice. The cost would likely depend on the

[83] European Commission (2021): Document 52021XC1229(05). Commission Notice – Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market.

practice and the organisation's capacity. However, in many cases this may present a move from non-compliance into compliance and so would not be in scope for the EANDCB.

423. Furthermore, even if compliance costs were overproportionate, there would still be little room for exempting small or micro business because of the nature of the harm being addressed (see the examples in box 1) and because it would undermine the policy objectives. Consumers should be protected, and be confident that they will be protected, from unfair commercial practices no matter who they buy from. Exemptions may even have the adverse effect of discouraging consumers from purchasing from small and micro businesses due to concerns about their rights. However, there is room for mitigations: government information and summaries of the changes will disproportionately benefit micro businesses in reducing the time they need to familiarise themselves sufficiently with the changes relevant to them.

Equalities

424. The available evidence presents a mixed picture on whether consumers with protected characteristics are significantly more (or less) likely to experience unfair commercial practices. We also cannot be certain how the absence of regulation against unfair commercial practices would impact different groups of consumers differently because we do not have a counterfactual. It may be possible to replicate the above analysis on how much different groups of consumers get compensated for problems associated with unfair commercial practices. However, the sub-sample sizes would be too small to produce robust results.

425. Still, the absence of consistent correlations merely means that vulnerable consumers and those with protected characters may be as likely as other consumers to be affected by the problem. Because most consumers would suffer more detriment if the CPRs were sunset (see rationale section), this implies that vulnerable consumers and those with protected characteristics would suffer also (just not necessarily more in absolute terms). Further, the proposed rewrite of the CPRs into the DMCC Bill may offer benefits for vulnerable consumers by clarifying that vulnerability covers not just personal characteristics but also circumstances of vulnerability, e.g. bereavement.

426. The European Consumer Conditions Scoreboard analysed how different groups of consumers were exposed to unfair commercial practices from domestic retailers to differing extents.[84] Figure 12 and Figure 13 show the results across the EU-28. Broadly, vulnerability in terms of socio-demographic factors had the strongest association with experiencing unfair commercial practices, with more vulnerable consumers being more likely to have experienced them than less vulnerable consumers.

427. There were also associations of experiencing unfair commercial practices and

- education (more consumers with higher education reported UCPs),
- consumers' financial situation (more consumers with a difficult financial situation reported UCPs),
- vulnerability due to complexity of offers, terms and conditions,
- internet use (more consumers who used the internet frequently reported UCPs), and
- employment status (more employed consumers reported UCPs).

[84] Consumers, Health, Agriculture and Food Executive Agency (Chafea) on behalf of the European Commission (2018): consumers' attitudes towards cross-border trade and consumer protection

428. The study found only small differences between the likelihood of experiencing unfair commercial practices and gender, urbanisation, or age, although consumers aged 55 to 64 reported somewhat higher likelihood.

Figure 12: EU-28 consumers' exposure to unfair commercial practices, by personal characteristics (1)

Exposure to unfair commercial practices from domestic retailers				
Gender	Male	Female		
	23.3% A	22.5% A		
Age	18-34	35-54	55-64	65+
	22.4% A	22.9% AB	24.3% B	22.0% A
Education level	Low	Medium	High	
	19.6%	23.1% A	23.6% A	
Financial situation	Very difficult	Fairly difficult	Fairly easy	Very easy
	26.3%	23.8%	22.2% A	21.7% A
Urbanisation	Rural area	Small town	Large town	
	22.9% A	23.1% A	22.6% A	
Employment status	Self-employed	Manager	Other white collar	Blue collar
	44.6% A	45.1% A	48.8%	43.2% A
	Student	Unemployed	Seeking a job	Retired
	19.9% A	22.7% A	21.6% A	23.1% A

Average incidence of the UCPs mentioned in Q13 from domestic retailers (answer 1) - Base: all EU27_2019 respondents (N=24,928)

Figure 13: EU-28 consumers' exposure to unfair commercial practices, by personal characteristics (2)

Exposure to unfair commercial practices from domestic retailers					
Languages	Only native	Two	Three	Four or more	
	21.3%	23.4% A	24.6% A	24.4% A	
Mother tongue	Not official language in home country	Official language in home country			
	24.9% A	22.8% A			
Numerical skills	Low	Medium	High		
	22.8% A	22.9% A	22.9% A		
Internet use	Daily	Weekly	Monthly	Hardly ever	Never
	24.2%	20.1% B	19.5% AB	19.8% AB	17.3% A
Consumer vulnerability (socio-demographic factors)	Very vulnerable	Somewhat vulnerable	Not vulnerable		
	25.3% A	25.2% A	21.0%		
Consumer vulnerability (complexity)	Very vulnerable	Somewhat vulnerable	Not vulnerable		
	25.8% A	24.8% A	21.7%		

Average incidence of the UCPs mentioned in Q13 from domestic retailers (answer 1) - Base: all EU27_2019 respondents (N=24,928)

429. The Consumer Protection Study 2022 analysed different groups of UK adults' experiences with consumer problems.[85] The summary Bill Impact Assessment provides an overview of how different personal characteristics might influence a person's likelihood to experience problems or to be negatively impacted by them. Broadly speaking, every protected characteristic had a statistically significant association with at least one of the outcomes analysed, though the full pattern is complex. The analysis referred to any type of consumer problem not just problems with unfair commercial practices. While further analysis would be required to isolate associations between protected characteristics and unfair commercial practices, the analysis above suggests that most, if not all, protected characteristics would be impacted in some form from a removal of the CPRs.

[85] Consumer Protection Study 2022: https://www.gov.uk/government/publications/consumer-protection-study-2022

Power to Amend List of Automatically Unfair Practices

430. The Consumer Protection Regulations (CPRs) outline 31 commercial practices prohibited in all circumstances and unlawful (i.e. without any need to prove likely or actual impact on the average consumer).

431. Government recognises the importance of ensuring that the list of automatically unfair practices in Schedule 1 of the CPRs can be updated to reflect current business practices. The bill includes a delegated legislative power to add to, amend and delete from the Schedule to ensure consumer law keeps pace with currents trends which are changing the way consumers interact with businesses.

432. The bill itself will not substantively amend the Schedule, however government is seeking to use the power to add practices related to fake online reviews in the first instance. Government will consult in due course on the use of such a power for these purposes.

433. In line with the better regulation framework, this IA discusses the anticipated secondary legislation to add fake reviews related practices to the Schedule below. Although the specific amendments currently envisaged are subject to consultation and extensive stakeholder engagement, the section below outlines the rationale for using the power in this instance.

Fake reviews

434. The Reforming Competition and Consumer Policy (RCCP) consultation sought views on ways for government to address the issue of fake online reviews. The government proposed adding the following to the list of automatically unfair practices in Schedule 1 of the Consumer Protection from Unfair Trading Regulations 2008[86] (CPRs):

i. **the practice of commissioning a person to write and/or submit fake consumer reviews of goods or services**

ii. **commissioning or incentivising any person to write and/or submit a fake consumer review of goods or services**

iii. **the practice of traders offering or advertising to submit, commission or facilitate fake reviews**

435. There were 58 formal responses to the questions asked on fake online reviews from a range of representative consumer, businesses, and trade bodies (around 30% of total respondents to the consultation). Of the 58 respondents, there was strong overall support for the above proposals. 78% of respondents were broadly in favour of the proposals, whilst 10% were not in favour and 12% were neutral about the proposals. These respondents were also largely not in favour of adding the commissioning of consumer reviews *in all circumstances* to the list of unfair commercial practices in Schedule 1, suggesting that the above proposals provide a more balanced approach.

436. The government thinks it is important that the list of automatically unfair practices in Schedule 1 of CPRs can be updated to reflect current business practices. Therefore, the government intends to take, through the Bill, a new power to add, to and modify the list of automatically unfair commercial practices in the Schedule, by regulations subject to Parliamentary approval.

437. There are no costs or benefits associated with the proposal to take a delegated legislative power to amend the Schedule. This is because the government proposes to take a legislative power, rather than to use the legislative power at this stage. As such, there will be no direct impact on businesses or consumers from the creation, in primary legislation

[86] https://www.legislation.gov.uk/uksi/2008/1277/contents/made

of the new power, so we do not estimate costs or benefits for this proposal, nor the number of businesses in scope.

438. Government will consult further in due course on the use of such a power to add the above commercial practices (see i, ii and iii above) to the Schedule. A consultation stage IA will be produced alongside that consultation, ahead of a final stage IA. Meanwhile, DBT is considering how it can continue to build the evidence base in order to better understand the consumer detriment arising from fake reviews and the effects on business competition, and to explore potential non-regulatory policy options.

Background

439. Genuine consumer reviews of goods and services help potential customers make decisions about whether or not to purchase something. Although the reviews are hosted online, the product or service subject to the review may have been purchased either online (for instance a product bought from an online seller) or offline (for instance a review of a restaurant). As they are usually expected to be provided by a party other than the seller, reviews differ from standard advertising or promotional material.

440. The development of the Internet has led to the popularisation of online-hosted customer reviews, where previous customers or users can give their own review for the benefit of other potential customers. Reviews posted by customers differ from reviews produced by experts or by people with authority, such as celebrities, public figures or social media 'influencers'[87], in that they provide consumers with information from their peers rather than from sources that may have a disproportionate ability to influence other consumers.[88]

441. Studies suggest consumers increasingly use reviews to make purchasing decisions with 97 per cent of adults in a survey undertaken by Which? in 2018 saying they use online customer reviews when researching a product.[89] GMI Research also found similar findings in their study.[90]

442. Reviews are usually descriptive in nature but frequently also feature a system of quantification, such as a 'star rating' system where reviewers can rate the quality of a product on a scale (often from 1 to 5). This allows for products to be ranked in terms of average rating, or for reviews to be searched and sorted by product rating, for instance if a customer wanted to specifically view what had been written by reviewers who had posted 1-star reviews. Further to this, average ratings may influence the prominence with which a product appears on search listings due to algorithms that are employed to promote the 'top-rated' products.

443. Reviews can be hosted from a number of different types of business, such as[91]:

a. Retailers, service providers or manufacturers, who sell their own products online and whose websites are mainly platforms for marketing and sales, but which allow customers to post reviews;

b. Booking agents, whose websites are designed to allow consumers to book or order services online from a third party, but allow customers to post reviews;

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[87] 'Influencers' include fitness gurus, gamers, beauty bloggers, fashionistas, foodies and travel experts. See OECD (2019b), "Online advertising: Trends, benefits and risks for consumers", *OECD Digital Economy Papers*, No. 272, OECD Publishing, Paris, https://doi.org/10.1787/1f42c85d-en.

[88] OECD (2019a) Understanding Online Consumer Reviews. Directorate for Science, Technology and Innovation Committee on Consumer Policy p 7.

[89] https://www.which.co.uk/news/2018/10/the-facts-about-fake-reviews/

[90] Reevoo survey cited in Consumer Focus (2012) p 7.

[91] Competition and Markets Authority (2015) Online reviews and endorsements: Report on the CMA's call for information; p 12-13; OECD (2019a) p 9.

c. Trusted trader schemes, which enable consumers to find tradespeople and host reviews to help consumers decide which tradesperson to hire;

d. Specialist review sites, whose core business model is to provide a platform through which consumers can view reviews of products and services from various providers, and in some cases are used directly by retailers and service providers to host reviews of their products;

e. Price comparison websites, whose core business model is based around comparing prices or other characteristics of products or services from third parties, but which host reviews to facilitate comparison.

Problem under consideration

444. Asymmetric information is a market failure that leads to socially inefficient economic outcomes. Risk-averse buyers are more likely to avoid making a purchase where they lack sufficient information, so if buyers in a market are risk-averse on average, lack of information will lead to an inefficiently low level of output when the market is in equilibrium. Risk-aversion has been found to be common across the population,[92,93,94,95] hence a lack of information on consumer products will have a dampening effect on consumption in general and thus on aggregate demand and economic growth.

445. To address this market failure, the risk to the buyer needs to be reduced, either through improving the information available to the buyer about the product on offer and/or the reliability of the seller, or transferring the risk back to the seller. Some government interventions act in this way, such as regulations requiring the provision of information (e.g. product labelling), or risk transfers such as minimum product or service standards. Furthermore, consumer protections give the consumer the right to return defective products, rights for refund and access to redress mechanisms, at the expense of the seller.

446. Genuine online reviews represent a market-based solution to the problem of asymmetric information between sellers and buyers. Sellers have more knowledge of the quality of their product than potential buyers, and transactions can be risky for the buyer. If a buyer is unable to accurately assess the quality of a product in advance of purchase, they may make an inefficient decision: either purchasing something that ultimately disappoints them or not purchasing something that they would have valued more highly than the transaction price if they had been able to assess its value correctly.

447. As such, genuine online reviews help to increase competition on aspects of quality and service that consumers value by reducing information asymmetries, enabling consumers to access better information on these issues, incentivising businesses to improve aspects of their service that may not otherwise have been visible to consumers at the point of purchase.[96] Small businesses in particular may benefit from consumer reviews because they do not have large advertising budgets to promote their business. Disparaging fake reviews may also have a disproportionate impact on a small business. Therefore, it is crucial that this market operates fairly.

448. Genuine consumer reviews are made by consumers who have used a good or a service, without pressure or incentive to provide a particular perspective. A fake review, on the other hand, is one that does not reflect an actual consumer's genuine experience of a good or service, and has been left in an attempt to manipulate consumer perception or target a particular business.

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[92] Bernoulli, D. (1954). Exposition of a new theory on the measurement of risk. Econometrica 22, 23–36.
[93] Pratt, J. (1964). Risk aversion in the small and in the large. Econometrica 32, 122–136.
[94] Arrow, K. J. (1965). Aspects of the theory of risk-bearing. Yrjö Jahnssonin Säätiö, Helsinki.
[95] Hintze, A., Olson, R., Adami, C. *et al.* (2015). Risk sensitivity as an evolutionary adaptation. *Sci Rep* 5**,** 8242.
[96] CMA (2015) p 15.

449. The digitisation of consumer reviews and the ease of posting fake reviews have created a growing 'industry' that thrives on creating and selling fake reviews, misleading consumers.[97] This is a concern both for businesses and consumers; bona fide UK businesses are likely to suffer lost sales and reputational damage from dishonest competitors duping customers. Such activities distort the market by undermining competition and by giving an unfair advantage to traders commissioning fake reviews.

450. An investigation by Which?[98] highlighted evidence of widespread fake reviews in online marketplaces. In December 2020, Which? signed up to 10 sites offering review manipulation services, including the exchange of free or discounted products for misleading reviews, or sales campaigns for sellers to boost their number of positive reviews, one of which was AMZTigers.[99] For Amazon marketplace sellers that just want reviews, AMZTigers sells them individually for around £13, or in bulk packages starting at £620 for 50 reviews going up to an £8,000 for 1,000 reviews. The account manager told Which? that AMZTigers could help sellers get an Amazon's Choice endorsement in less than a fortnight by using its pool of buyers to generate sales on certain search terms – such as 'Bluetooth headphones' – on Amazon. According to Which?, the Amazon's Choice badge is well trusted, with four in ten (44%) Amazon customers (people who have been on the website in the last six months and have spotted an Amazon's Choice logo) believe it means a product has been quality checked by Amazon, while a third (35%) believe it means it has been checked for safety. And when people notice the logo, just under half (45%) of shoppers said they were more likely to purchase a product from Amazon with the badge than without.

451. However, commissioned reviews are not necessarily all misleading or harmful. For example, there could be instances where technical experts or online 'influencers' may be commissioned by traders to provide online reviews of goods and services offered to consumers. Furthermore, there may be limited circumstances where consumers themselves are provided with incentives (such as a free product) to submit reviews. Government considers that such reviews will not be "fake" if they reflect the expert's, influencer's or consumer's genuine experience or impartial opinion of the good or service (for example, where a consumer reviewer is not specifically asked to write a certain type of review as a condition of accepting the incentive). A new small business might be hard pressed to find or obtain reviews of their goods, services, or digital content unless they incentivise a consumer to write a review; in such cases, it should be disclosed that the consumer was incentivised to write the review so as not to mislead consumers.

Rationale for intervention

452. Genuine reviews serve a valuable purpose in addressing the market failure of asymmetric information outlined above. As online reviews and reputation systems have become well-established through platforms, review sites and sellers' own sites, this represents a private sector-led solution to the market failure. The role for government here is in protecting the integrity of the review system, by preventing parties that attempt to distort it through providing fake reviews or other misrepresentation of the way in which review information is presented to consumers.

453. Government can set out the rules that determine what type of content is allowed and the appropriate enforcement bodies can take action against parties that are responsible for producing or proliferating harmful content, such as fake reviews, whilst also not discouraging beneficial content. Effective enforcement can deter the production of fake reviews by making the cost to the party responsible (for instance due to being subject to

[97] How a thriving fake review industry is gaming Amazon marketplace; consumer watchdog Which? Feb. 2021
[98] https://www.which.co.uk/news/2021/02/how-a-thriving-fake-review-industry-is-gaming-amazon-marketplace/
[99] AMZTigers is a company based in Germany offering 'review campaigns' that it claims will 'help your products become best sellers'. It has a large number of reviewers: 62,000 globally, which can be used depending on where sellers ship to, and 20,000 are based in the UK (Which? 2021).

enforcement sanctions) greater than the benefit of producing the fake reviews, including where sites that host reviews deliberately distort the selection or presentation of reviews.

454. The CPRs prohibit unfair commercial practices (as defined in the regulations). Specifically, they require traders to exercise professional diligence towards consumers as well as prohibiting misleading actions or omissions and aggressive practices where these are likely to have an impact on the economic decision making of the notional 'average consumer'. These concepts are defined in CPRs. Schedule 1 of the CPRs sets out 31 'banned practices', which will be unfair in all circumstances, without the need to consider their effect on consumer decision making e.g., where a trader falsely represents themselves as a consumer. The list includes bait advertising[100], bait and switch[101], limited offers[102], false free offers[103], pressure selling and aggressive doorstop selling.

455. Even where a practice is not already specified on the list of 'banned practices' in the CPRs, it may nevertheless be unfair under the other substantive prohibitions of the CPRs. For example, where a trader commissions or incentivises another person to write or submit a misleading fake review and this is likely to affect the economic decision making of the average consumer this could (depending on the specific facts and circumstances) amount to a misleading omission/ contravention of the standards of professional diligence. By consulting with stakeholders on adding this - and other specific harmful practices - to the list of automatically unfair 'banned practices', government will explore potential solutions to help ensure certainty and facilitate more efficient enforcement by regulators, and send a clear signal to traders. This view is supported by the literature referenced above which evidences a growing prevalence of fake reviews as well as an emerging market for traders to purchase them. Therefore, there are strong grounds for potential further intervention, particularly given some practices are likely to grow with increasing online activity from consumers and further exacerbate the market failure of asymmetric information and its adverse consequences.

456. Furthermore, to improve the authenticity of online reviews and to reduce the extent to which they can mislead consumers, government can make businesses that host reviews responsible for taking some reasonable level of action to ensure that their sites do not become easy sources where fake reviews can be posted. However, government should ensure that the cost of compliance does not exceed the value to the hosting site of allowing reviews to be posted, otherwise the hosts will be incentivised to simply stop allowing reviews, removing an important source of consumer information and exacerbating the original market failure of asymmetric information.

Objectives

457. The policy objective is to improve the integrity of online reviews as a method by which consumers can gather information on rival offers from sellers, and sellers can signal the quality of their offers.

458. The objective aims to:

i. Prevent reviews that are not associated with a genuine purchase;

ii. Prevent reviews from being misrepresented by sellers;

iii. Create greater transparency where reviews have been incentivised;

iv. Prevent the trade in fake online reviews

[100] Luring in a consumer with offers that the trader cannot offer or has only a small amount of availability.
[101] Promoting one product with the intent of selling the consumer a different product.
[102] Falsely stating that an offer is available only for a limited time.
[103] Offers are only free if the only charge the consumer faces is the unavoidable cost of responding to the offer and for delivery and collection.

459. It is important to note that the intention is not to moderate, censor or verify the accuracy of the content of genuine consumer reviews.

Options

460. **Do-nothing option** - this option acts as the business-as-usual counterfactual. The current impact of fake reviews on consumers and businesses would continue.

461. **Preferred option** – to update the list of automatically unfair practices in Schedule 1 of the CPRs to reflect current business practices related to fake reviews. This is to be done through taking the delegated legislative power to amend the Schedule, subject to Parliamentary approval.

462. If approved, and based on feedback from the RCCP consultation, government will consult in due course on the use of such a power to add the following three additional commercial practices to the existing list of unfair commercial practices in Schedule 1:

v. commissioning or incentivising any person to write and/or submit a fake consumer review of goods or services;

vi. hosting consumer reviews without taking reasonable and proportionate steps to check they are genuine; and

vii. offering or advertising to submit, commission or facilitate fake reviews.

463. The government notes that they will provide clear guidelines to businesses for what these 'reasonable and proportionate steps' would be. The guidance will be developed by DBT after further consultation with businesses and relevant stakeholders. Moreover, if the practices of commissioning 'fake reviews' and hosting reviews without having taken these reasonable and proportionate steps to ensure that the reviews are genuine are included in the list of unfair practices in Schedule 1, we propose that it be listed as a civil offence and not a criminal offence. The CPRs already prohibit businesses from certain practices which may compromise the validity and timeliness of information provided through reviews to consumers.

464. The significance of adding these practices to the list of unfair commercial practices in Schedule 1 is that they will be expressly prohibited. This means that traders, including online platforms, who carry out these particular commercial practices would be automatically in breach of the CPRs. There would not be a need to show that the practice (e.g. of presenting reviews as genuine without taking reasonable steps to verify this) caused or would be likely to cause the consumer to take a different decision because of it.

465. **Non-regulatory option** – government will continue to explore other viable non-regulatory options and consider supporting research ahead of consultation.

Cost benefit analysis framework

466. As mentioned in the introduction of this section, the intention for the use of the power is to make additions to Schedule 1 of the CPRs. The analysis presented here is therefore with the goal of explaining the possible effects of how the power will be used; but that proposed use will be further consulted on before it takes place and will be supported by a later Consultation Stage (and then Final) impact assessment.

467. Costs and benefits have not been monetised at this early stage but they are described qualitatively below.

Number of businesses in scope

468. There is no known record of the number of businesses that host reviews, nor a breakdown of the different types of businesses that may host reviews (such as platforms, review sites, trusted traders or booking sites that allow reviews to be posted; or sellers hosting reviews of their own products). However, subject to further research and its outputs on the prevalence of fake reviews, the government may be able to form estimates of the number of UK-based businesses or goods and service affected by fake reviews.

Costs

469. **Administration costs -** government expects that businesses will need to take action to ensure compliance and will therefore incur some administrative costs.

470. **Familiarisation costs -** There will be some small costs of familiarisation associated with any amendments to the CPRs. These will be one-off costs, incurred at the point the regulations are amended.

Benefits

471. The benefits of this proposal would come from reduction in the incidence of fake reviews and the associated improvement in the integrity and level of trust in the review system.

472. **Consumer benefits** – a reduction in the incidence of fake online reviews will improve the quality of the information offered to consumers, leading to consumers making more informed and efficient spending decisions. Though the government notes these theories are yet to be confirmed by further research into the matter.

473. **Business benefits** - businesses that were sellers of high-quality products would benefit from the improved signalling ability of reviews to indicate the respective quality of rival offers in the market. Businesses who are engaged in the practice of creating or commissioning fake reviews due to feeling pressured by their competitors to do so will benefit by no longer needing to divert resources away from productive activity if that pressure is removed.[104] Furthermore, bona fide businesses may see consumer expenditure transferred to them as the deterrence of fake reviews leads to the aforementioned improvements in competition.

[104] Malbon, Justin E., Taking Fake Online Consumer Reviews Seriously (2013). 36(2) Journal of Consumer Policy 139-157, 2013

Cross-cutting reforms

474. **This section considers the impacts of reforms which cut across the CMA's enforcement functions (including in digital markets)**

Background

475. The CMA holds cross-cutting powers it can use across its competition and consumer tools as granted in EA02.

Rationale for Intervention

Strengthening extraterritorial jurisdiction

476. Globalisation and EU-exit mean that the CMA will investigate much more routinely agreements and conduct that affects competition in European and worldwide markets, including the UK, but which are decided upon and implemented by overseas entities. It will be more routinely taking on larger, more complex cases which are more likely to involve big businesses with complex legal structures. For instance, in 2021 the CMA launched an investigation into Google's Privacy Sandbox.

477. In many of those cases, the CMA would expect critical evidence to be held by foreign entities outside the UK, including some with no presence in the UK. The ability to require evidence from those entities will be crucial to the success, and swift progression, of any enforcement action. Information may be needed from the party to an investigation, which is based overseas but whose conduct has an effect in the UK, or from third parties based overseas which hold critical information needed to help the CMA progress a case.

478. Given the increase in the international aspects of the CMA's work there is a strong case to provide clarity around the CMA's powers to require information from persons based in other jurisdictions where they are either under investigation by the CMA or they have a clear link to the UK and the information requested is relevant to a matter under investigation.

Investigative assistance and international cooperation

479. Trends in globalisation and technological advancements in communications and transport mean that businesses are increasingly able to affect competition and consumers in other jurisdictions. Furthermore, as highlighted earlier in this impact assessment, advancements in cloud computing also mean that it is increasingly common that information relevant to a UK investigation will be held outside of the UK.

480. Technological advancements have played a pivotal role in driving economic growth and development across the world, however the way in which businesses employing anti-competitive practices can impact other jurisdictions is also increasingly clear. To tackle this, countries are beginning to develop arrangements for the provision of investigative assistance to overseas competition and consumer authorities in return for the ability to request reciprocal assistance themselves.

481. In competition and consumer protection law, the UK's competition and consumer authorities can currently share information gathered in domestic competition law investigations with international counterparts. However, this does not include powers to gather information on behalf of an international counterpart (otherwise known as 'investigative assistance'). This type of investigative assistance exists in UK criminal law and some regulatory systems, but it is not currently available in UK civil competition (including digital) and consumer law investigations.

482. UK competition and consumer authorities can assist their overseas counterparts in ways which do not require the use of statutory information gathering powers, however the level of information obtainable through these means is typically limited. For example, the CMA may assist an overseas authority with locating publicly available information or may conduct a voluntary interview with a witness on behalf of an overseas authority.

483. Several of the UK's international partners (including Australia, Canada and the USA) already allow for investigative assistance in their laws.[105] The U.S regime is dealt with in standalone primary legislation and is limited to antitrust matters only. It grants the Federal Trade Commission and the Department of Justice the power to negotiate bilateral investigative assistance agreements with overseas antitrust authorities. Furthermore, if a foreign request is granted, it permits the Federal Trade Commission to offer assistance to foreign governments.

484. Australia also enables its regulators to provide investigative assistance to foreign regulators in their administration or enforcement of foreign business laws by obtaining relevant information, documents and evidence and sharing it with them. Like the U.S, applications by a foreign agency will be made to a commonwealth regulator in the first instance who will make an initial assessment of the application and ultimately approve or reject it. The assessing regulator will also consider whether a similar level of assistance can be offered to Australia by the foreign regulator, although reciprocity is not a requirement under the regime.

485. Reciprocity is an important feature of enhanced co-operation between competition regulators as the level of exchange will often determine the extent of co-operation in practice. This highlights a gap in the UK's international co-operation powers, as although the CMA can share information it already has on file with overseas regulators, the CMA cannot gather new information on behalf of an overseas regulator. Given this gap in the CMA's powers limits what can be provided to overseas regulators, it will also limit the CMA's ability to leverage assistance from overseas regulators which will in turn undermine the running of civil competition cases in the UK.

486. Furthermore, in 2014, the OECD endorsed investigative assistance as part of its guidance on international best practice for cooperation between competition authorities. The OECD stated *"[The Council] recommends that regardless of whether two or more Adherents proceed against the same or related anticompetitive practice or merger with anticompetitive effects, competition authorities of the Adherents should support each other on a voluntary basis in their enforcement activity by providing each other with investigative assistance as appropriate and practicable, taking into account available resources and priorities."*

487. In 2020, the CMA also joined a framework agreement with the competition regulators of Australia, Canada, New Zealand and the U.S – the Multilateral Mutual Assistance and Cooperation framework[106] (MMAC). The MMAC framework sets out a 'gold standard' of how investigative assistance should work in practice and echoes the enhanced cooperation activities recommended by the OECD. The UK has set out its intention to be able to fully implement this model agreement, and other similar agreements in the future. If the UK is to meet this standard, to facilitate this level of cooperation the CMA must have enhanced investigative assistance powers to gather information on behalf of overseas regulators.

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[105] For Canada, see the *Competition Act* (1985); for Australia, see *Mutual Assistance in Business Regulation Act* (1992); for the US, see the *International Antitrust Enforcement Assistance Act* (1994).

[106] https://www.gov.uk/government/publications/multilateral-mutual-assistance-and-cooperation-framework-between-the-cma-accc-cbc-nzcc-usdoj-and-usftc

488. Ensuring optimal international co-operation also requires the necessary frameworks to facilitate the CMA and other UK authorities in exchanging information with overseas authorities. Under Part 9 of EA02, the CMA currently enjoys some levels of cooperation with overseas authorities under the existing gateways it sets out. Currently, the CMA can only disclose 'specified information' to overseas authorities. Specified information is, broadly, information relating to the affairs of a business or individual, which is obtained by a competition or consumer protection authority in the course of its functions and is not otherwise in the public domain.

489. The gateways enabling overseas disclosure of specified information include cases where the public authority has received each required consent, one allowing information to be shared for the purpose of enabling the exercise of the disclosing authority's statutory functions and one for the purpose of civil investigations that relate to consumer and competition matters or any criminal investigation or proceeding. Although these gateways allow some level of information exchange, they set out specific circumstances and criteria which effectively limit the instances where information can be shared.

490. Unless amended, the current framework will restrict the UK's ability to share information as freely as is usually sought by the UK's international partners. Furthermore, these limitations should be alleviated given the volume of antitrust and merger cases involving both the UK and overseas jurisdictions now that the UK has left the EU is expected to increase.

Penalties for non-compliance with evidence gathering powers

491. The CMA has formal powers to request information and interview witnesses across its CA98, markets and merger enforcement. The CMA can also enter domestic and business premises (under a warrant if necessary) during its CA98 investigations. Failure to comply with an investigative power can amount to a criminal offence, and the CMA also has powers to impose civil penalties for non-compliance.

492. There are three main areas of the current regime for non-compliance with investigative measures:

a. Civil penalties for failing to comply with an investigative measure (such as not responding to an information request by a specified deadline). Such failures may also amount to a criminal offence,

b. Criminal offences relating to the provision of false or misleading information, and

c. Criminal offences relating to the destruction or falsification of documents.

493. Sanctions for non-compliance act as a deterrent to businesses who may not facilitate the CMA's evidence gathering activities in a timely manner. Businesses under investigation may be incentivised to intentionally undermine the progress of an investigation to avoid any penalties or remedies that may disrupt anti-competitive practices. Competition penalties upon case completion for antitrust violations in the tens of millions of pounds are not uncommon and far exceed the penalties associated with non-compliance with the CMA's investigation powers. Furthermore, anti-competitive behaviour can drive excessive profits which will also act as incentive to undermine the operation of a case which may remedy such behaviour.

494. The current package of civil sanctions for non-compliance with investigative measures consists of a £30,000 fine. For most businesses under CMA investigation, £30,000 is a small fraction of total turnover. Furthermore, following the UK's departure from the EU, the CMA will be more regularly investigating large multinational corporations which will further drive the disparity between non-compliance penalties and business turnover.

495. Penalties in other jurisdictions can far exceed those the CMA award, for example, the European Commission has previously imposed penalties worth tens of millions of pounds

for procedural breaches. The relative size of the civil penalties available to the CMA in these instances significantly diminishes their deterrent effect and the incentives they bring for parties under investigation to comply with the regime. Subsequently, compliance is largely determined by the moral or reputational imperatives to abide by the law as opposed to the associated financial penalty. Although this may be sufficient for most businesses, for a penalty regime to be effective it should be designed to incentivise compliance in those businesses that may contemplate non-compliance.

496. Criminal sanctions where they apply, are serious. However, effective deterrence also needs to account for the likelihood of enforcement action being brought. A criminal prosecution is a major undertaking and as such is likely to be only justified in cases where there is a particularly extreme or serious violation. Additionally, the rules around attributing conduct to businesses may make it particularly difficult to hold the businesses themselves to account for violations of these measures. To date, no criminal prosecutions have been brought by the CMA for violation of these measures.

497. Furthermore, the CMA currently has four weeks to impose a penalty decision in mergers and markets cases. This introduces the chance of the CMA being timed out of being able to bring an enforcement case penalty as it balances its other responsibilities.

498. In conclusion, although the current regime grants the CMA the power to impose civil sanctions on non-compliant businesses during investigations, they are not proportionate enough to act as an effective deterrent against non-compliance for a handful of businesses. This can be seen by the equivalent penalties imposed by other jurisdictions which far exceed those available to the CMA. Additionally, although criminal sanctions are useful, the low likelihood of enforcement actions in this context lowers their deterrent effect. Furthermore, the time constraints imposed on the CMA to impose a penalty decision in mergers and markets cases is considered to be unduly restrictive.

Penalties for non-compliance with orders and undertakings

499. Each of CA98 enforcement, the mergers regime and the markets regime have a different mechanism for bringing investigations to an end. There is some variation in the current enforcement regime as the CMA can impose a penalty where there has been a breach of an Initial Enforcement Order (IEO) in the mergers regime, but for any other failure to comply with a remedy, the CMA is limited to enforcement via the courts. There is growing evidence of non-compliance with the CMA's orders and undertakings, for example, the CMA identified over fifty significant breaches of orders and undertakings across the CMA's tools from January 2018 to February 2020.

500. Non-compliance with remedies can arise in any key sector of the economy, for example, large banks. Where businesses either fail to follow or comply with CMA remedies, adverse effects on competition are left unresolved, and therefore continue to adversely impact many UK consumers.[107]

501. Such significant non-compliance suggests that there are not sufficient incentives in place to comply with CMA orders, and the businesses who are willing to break the law may see no advantages to compliance. The CMA can enforce remedial measures through a follow-up order, however the business having been forced to fulfil the obligation following a court order is generally not much worse off for not complying in the first instance as there is no additional penalty resulting from this (other than potentially being liable for the costs of the enforcement action).

502. Breaches may also last for several years, for example, breaches of the Payment Protection Insurance Market Investigation Order 2011, lasted from 2012 until 2018.

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[107] *One breach involved over 130,000 customers receiving charges from their bank for going overdrawn without having received a text alert first. The Retail Banking Order mandated that those customers should have received a text alert before charges were imposed.*

Where breaches are long lasting, they prolong the adverse impact of anti-competitive conduct on consumers and may even begin to distort markets.

503. The UK's enforcement regime also varies from its international counterparts in this respect. The European Commission and other competition authorities such as in France, Belgium and Italy can impose penalties for breaches of remedies including commitments and interim measures. For example, the European Commission can impose penalties for breaches of commitments and interim measures of up to 10% of a firm's annual turnover. Whilst the CMA lacks the power to penalise non-compliant businesses, there is little incentive for them to comply with orders and undertakings and the costs arising from non-compliance will persist.

Expanded duty of expedition

504. **This duty will cover consumer and competition functions (including digital markets functions)**

505. The speed at which the CMA conducts its investigations across market inquiries, mergers and CA98 cases is a critical aspect of its casework in terms of ensuring competition concerns are remedied quickly, disruption to business activity is minimised and that the CMA can optimise the use of its resources. The pace at which the CMA conducts an investigation, amongst various other factors, is dependent on the type of investigation, its complexity, the statutory timescales and obligations in place and the extent to which involved parties co-operate.

506. In respect of its merger control functions under the Enterprise Act 2002, the CMA is under a statutory Duty of Expedition. The duty requires that "*In making any decision for the purposes of its functions of making and determining references under this Part, the CMA shall have regard, with a view to the prevention or removal of uncertainty, to the need for making a decision as soon as reasonably practicable*' [108]

507. In contrast, under its other enforcement functions, including CA98 cases and markets cases, the CMA is not subject to an overarching duty of expedition (although there are provisions for deadlines to apply to its functions).

508. There is a public interest in the CMA conducting its competition and consumer cases as efficiently as possible, reducing uncertainty and disruption for businesses. Speed is therefore a key objective for the competition and consumer law regime. The Government therefore considers that this should be explicitly reflected in the CMA's statutory duties, and therefore intends to introduce a statutory duty of expedition, making clear that the CMA is under a duty of expedition in relation to its competition and consumer law functions, including the functions relating to the new digital markets regime.

Designation of the CMA as a specified prosecutor under the Serious Organised Crime and Police Act 2005 (SOCPA)

509. The CMA operates a leniency regime under which businesses who breach competition law can gain immunity from, or a reduction in, fines for breach of the civil antitrust laws. The CMA can also issue an individual with a written notice called a 'no action letter' under s.190(4) EA02 which provides immunity from prosecution for the cartel offence referred to in the letter. The SOCPA regime does not provide immunity (which is what s.71 relates to) in relation to the EA02 (s.71(7) of SOCPA excludes the provision of an immunity notice pursuant to that provision, as the CMA have access to the no-action letter under s.190(4) EA02).

[108] EA02 S.103

510. The purpose of the leniency regime overall is to assist in the detection, investigation and prosecution of cartels which are usually conducted in secret tend to generate little to no substantive evidence of their activity.

511. A no-action letter can be issued to an individual by the CMA when either:

a. The business employing the individual has been granted civil immunity from financial penalties, or lenient treatment, under the CA98, or

b. The individual has approached the CMA independently for a no-action letter.

512. However, an individual who wishes to assist in an investigation may be ineligible for a 'no action letter' and immunity from prosecution if they are not the first person to provide information. Such individuals may still wish to assist an investigation by becoming an 'assisting offender', which might involve giving evidence against co-defendants, and so may not do so unless the necessary immunity guarantees are in place.

513. The use of assisting offenders in England and Wales is regulated under the SOCPA. Sections 71 to 75 of SOCPA set out a statutory framework for regulating agreements with offenders who have offered to assist in the investigation or prosecution of offences committed by others and provides immunity from prosecution by a specified prosecutor[109]. Sections 73, 74 and 75 of SOCPA were repealed by and replaced with sections from the Sentencing Act 2020 for England and Wales.

514. Immunity notices under SOCPA cannot be granted in respect of the criminal cartel offence set out in EA02. This ensures that the provision set out in s.190 EA02 govern immunity from prosecution for the cartel offence. The CMA is not designated as a specified prosecutor meaning neither the CMA nor the suspect can benefit from the statutory safeguards of the SOCPA regime. In contrast, other enforcement bodies with similar powers such as the Serious Fraud Office (SFO) and the FCA are designated as specified prosecutors.

515. The ability to enter into formal agreements with 'assisting offenders' offers an effective avenue to gather evidence during CMA investigations where it may otherwise be sparse. Where an offender is not eligible for a no-action letter, the CMA cannot offer other assurances in the context of a statutory framework, which offers benefits to both the enforcer and the offender

516. Cartels cause considerable harm to consumers and other businesses alike through higher prices and anti-competitive practices which distort markets. SOCPA has already set out an established framework which will assist the CMA in the detection and investigation of cartels through co-operation with assisting offenders. Whilst the CMA lacks the power to utilise this framework, harm from cartel activity will likely persist for longer than would be the case where the CMA is a designated specified prosecutor.

Policy Proposals

517. This IA considers two options. A **preferred option**, introducing a package of cross-cutting amendments to EA02, CA98 and the reforms to digital markets to improve the speed and quality of the CMA's casework, and a **do-nothing** option which acts as the business-as-usual counterfactual. These two options are described below.

518. **Preferred option** – this offers a suite of measures which predominantly relate to bolstering the CMA's evidence gathering powers or increasing the speed of casework across CA98 cases, market and merger investigations.

i. Clarifying scope of CMA's powers to obtain information from companies overseas.

[109] SOCPA also provides the following - s.72 SOCPA concerns restricted use undertakings and ss.73 and 74 if SOCPA concern the reduction and review of sentences.

ii. Enabling the UK's competition authorities to use compulsory information gathering powers to obtain information on behalf of overseas authorities.

iii. Permitting more effective and flexible international cooperation by updating the rules governing information sharing between authorities.

iv. Tougher, turnover-based penalties for businesses which fail to comply with the CMA's investigation gathering powers across the CMA's enforcement tools.

v. Enabling the CMA to impose civil turnover-based penalties for non-compliance with orders or directions imposed by the CMA, or undertakings and commitments accepted by the CMA, across its competition enforcement functions.

vi. A new "Duty of Expedition" applying to the CMA in respect of its enforcement functions (including in digital markets).

vii. Designating the CMA as a specified prosecutor able to enter into agreements with assisting offenders

519. **Do-nothing** – this option leaves the mergers, markets and CA98 investigations unchanged and as set out in EA02 and CA98 unchanged. This acts as the counterfactual to the preferred option.

Summary of the preferred option

520. The reforms include a proposal to make express provision to clarify that the CMA has the ability to issue information notices to persons under investigation even if they are based outside of the UK. It allows for information notices to be issued to persons based outside of the UK where they have a clear connection to the UK (e.g. they are a UK national, UK registered company, or carry on business within the UK), where the information requested is relevant to the matter under investigation. Express provision would also be made regarding the service of documents in these circumstances, and enforcement which would be by way of civil penalty. This proposal will enable the CMA to effectively and routinely investigate agreements and conduct that affects competition in the UK following EU-exit.

521. The reforms include the creation of a new legal framework to allow the CMA and other UK consumer protection authorities to provide investigative assistance to their overseas counterparts. These powers will simplify the provision of assistance in this context and alleviate competition authorities' reliance on the police for assistance. The reforms include sufficient safeguards which apply to the use of these powers to ensure they are used proportionately and in a manner which preserves confidentiality. The framework also provides the relevant authorities with the discretion to seek reimbursement by the overseas authorities for the costs arising from the assistance request.

522. This places the UK in much better stead to leverage assistance from overseas authorities through reciprocity at little to no additional cost to the exchequer. This will strengthen the CMA's capability to uphold pro-consumer and competitive outcomes in the UK by enhancing its powers to gather information on anti-competitive behaviour in other jurisdictions which is impacting UK markets. Furthermore, these powers align with the UK's commitment to meet the standard outlined in the Multilateral Mutual Assistance and Cooperation framework (MMAC).

523. The preferred option also includes a proposal which creates a flexible and efficient legal framework to share information between relevant UK authorities and their international counterparts. This revised overseas disclosure gateway is intended to assist with the government's aim of negotiating new, detailed cooperation arrangements with key international partners which should further facilitate closer and more effective cooperation, particularly in the competition and consumer spheres. The proposal will benefit authorities applying competition law (excluding market studies or investigations), digital competition

law (including the DMU's core powers covering designation, orders, etc.) and consumer protection law.

524. Furthermore, the UK, alongside the CMA, is currently negotiating a series of arrangements with international counterparts to facilitate cooperation with overseas competition authorities. Similar arrangements will be negotiated with other international partners in the future. Whilst the proposal does not implement these types of arrangement, they will go a long way in facilitating cooperation with international counterparts and the types of information exchange envisaged by such arrangements and effectively enhance the CMA's international information gathering powers.

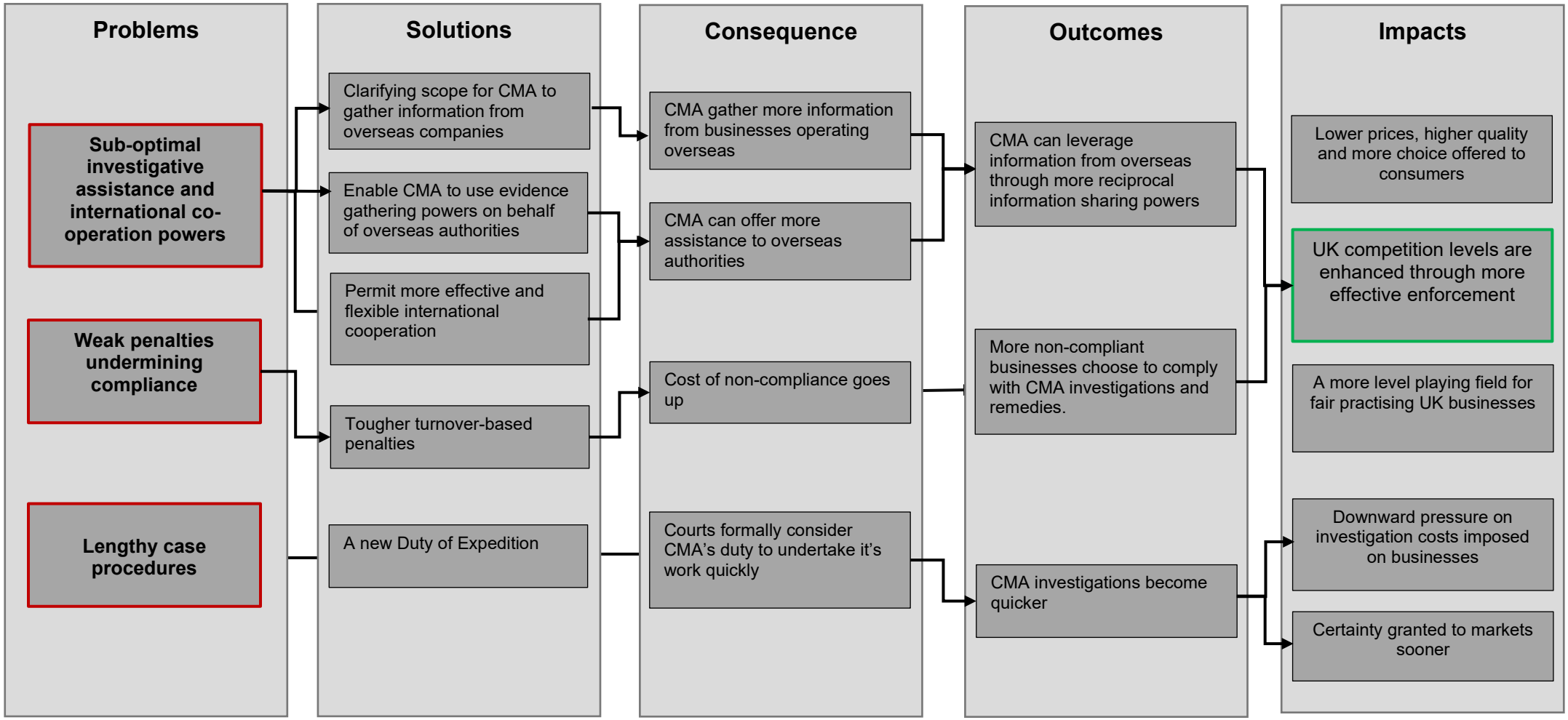
525. The proposed option amends the framework for enforcement penalties across the CMA's powers so that there is a consistent approach to its ability to use civil penalties in response to investigatory non-compliance by introducing new civil penalties where only criminal offences currently exist. The proposal increases the level of applicable penalties to up to one per cent of a business' annual turnover, whilst also increasing the timeframe for bringing enforcement action in relation to imposing civil penalties for investigatory non-compliance in the mergers and markets regime to 10-weeks. Furthermore, the proposed option creates a power for the CMA, the Secretary of State or the concurrent regulators to be able to impose a civil penalty of up to five per cent of annual turnover where there is a failure to comply without reasonable excuse with orders, commitments, directions and undertakings. These amendments create a more proportionate penalty framework by ensuring sanctions have a deterrent effect on non-compliant businesses. The extension of the timeframes for enforcement will also ensure the CMA have adequate time to make decisions regarding penalties in the mergers and markets context.

526. The package also includes a new statutory duty of expedition which applies across all the CMA's enforcement functions (including in digital markets). This new duty will serve as a clear statement from Government that the CMA should discharge its functions swiftly, given the benefits of swift and agile regulation.

527. The preferred option gives the CMA access to the statutory regime under SOCPA as a specified prosecutor. This enables the CMA to use the 'assisting offender' framework to enhance its criminal cartel enforcement by providing an offender who wishes to assist with prosecution but fails to qualify for a 'no-action' letter with greater certainty regarding the applicable procedure and the benefit of accompanying statutory safeguards. This will complement the CMA's existing no-action letter regime through offering an additional avenue for co-operation where defendants do not qualify for a no-action letter. This strengthens the CMA's ability to detect and prosecute criminal cartels and subsequently enhance competitive outcomes to the benefit of both consumers and businesses.

528. Figure 14 below illustrates the intended mechanism of how the proposals set out in the preferred option resolve the issues highlighted above and achieve the stated objectives.

Figure 14 - Theory of change



Cost-Benefit Analysis

529. Given that many of the proposals outlined in the preferred option amend or clarify existing legislation, they are not expected to have a large impact on businesses, particularly since only a handful of businesses will be involved in the CMA's casework. That said, for the measures where quantification is possible, government has conducted evidence gathering activities on the cost to business using a 'Standard Cost Model' approach.

530. Government has conducted surveys with industry to understand the business resource needed to comply with any additional procedures the amendments are expected to result in. This additional compliance cost to businesses is an opportunity cost as it represents time diverted away from profit generating business activity. Range estimates have been presented as in reality the compliance cost imposed on a business will vary on a case-by-case basis, and the way it will vary is inherently uncertain. The reported hourly resource has then been multiplied by wage tariffs reported in the Annual Survey of Hours and Earnings[162] (ASHE) and upscaled by a non-wage factor[163] to arrive at an estimated compliance cost of the activity. This activity cost is then multiplied by the number of times government anticipates it will be undertaken (and by how many businesses) to arrive at an aggregate cost impact on businesses.

531. Given that some of these proposals cut across the competition powers granted in EA02 and CA98, it is appropriate to consider whether administrative exclusion D (pro-competition) outlined in Better Regulation guidance[164] would apply to any quantified business impacts. Only proposal (ii), the proposal to enable the CMA to use compulsory information gathering powers on behalf of overseas authorities, has been quantified. Whilst this measure promotes stronger links between the CMA and overseas authorities in a manner which may indirectly strengthen competition in the UK in the future, the measure itself does not directly promote competition in the UK. Therefore it does not meet the criteria of administrative exclusion D (pro-competition).

532. Considering this, this measure has been classified as a QRP and contributes to the BIT.

533. None of the measures are expected to impose costs on consumers. The CMA's competition and consumer investigations concern the conduct of businesses and therefore the proposals will not directly affect consumers. Where proposed measures are expected to promote competitive and pro-consumer outcomes the expected indirect benefits to consumers have been assessed qualitatively.

534. Where quantification has not been completed given a lack of available evidence on how some of the smaller changes to existing processes may impact businesses, a qualitative description has been provided justifying the approach taken and describing the impact the measure will have. This is considered a proportionate approach given this appraisal concerns several subtle amendments which are not expected to have a large impact and lack sufficient empirical evidence to quantify impacts robustly.

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[162] Annual Survey of Hours and Earnings: 2021 provisional results. Table 14.6a Hourly pay - Excluding overtime (£) - For all employee jobs: United Kingdom, 2020.
[163] Derived from Eurostat data on wages and non-wage labour costs https://ec.europa.eu/eurostat/statistics-explained/index.php/Hourly_labour_costs#Non-wage_costs_highest_in_France_and_Sweden
[164] https://www.gov.uk/government/publications/better-regulation-framework

535. **All presented cost estimates are in £2021 prices unless stated otherwise.**

Clarifying scope of CMA's powers to obtain information from companies overseas.

536. The measure will not introduce an additional cost to the Exchequer. Furthermore, these requests will concern overseas companies and will therefore not impose costs on UK businesses or consumers. In instances where the CMA's casework involving overseas companies is hastened because of clearer evidence gathering rules, both businesses and consumers will benefit where pro-competitive outcomes for the UK are delivered as a result.

Enabling the UK's competition authorities to use compulsory information gathering powers to obtain information on behalf of overseas authorities.

537. This proposal would enable the CMA to use its statutory evidence gathering powers to respond to requests for information on behalf of overseas authorities. It will directly impact businesses which these requests concern through the cost arising from responding to the CMA's RFI. Whilst it is expected that only a handful of businesses will be required to respond to this type of request on a yearly basis, it will impose costs on businesses who must use resource to source, process and assure any provided information. It is anticipated that the businesses undertaking this sort of request will be larger ones with an international presence. Considering this the analysis also assumes that the business will have the resource to employ significant legal assistance to advise them throughout the process.

538. Following evidence gathered from surveys conducted with industry stakeholders, government has estimated that, on average, responding to an RFI from an overseas authority will impose an additional **£2,000 to £5,000 of internal business administration costs as well as £18,000 to £36,000 of external legal advice costs** in examining the information provided. Under these assumptions, the total opportunity cost to an affected business is estimated to be between **£20,000 to £41,000.**

539. Based on advice from the CMA, it is assumed that this power will be used, on average, four times a year. This is a conservative assumption considering that there will likely be a limited number of cases where a competition authority in another jurisdiction, who is investigating a business active in the UK, must rely on the CMA to obtain the information in the absence of any available avenues through their own jurisdiction. This results in an aggregate direct cost to businesses of **£80,000 to £160,000 per year**.

540. Table 14 below contains a breakdown of the estimated costs.

Table 14 - Breakdown of estimated costs to business of responding to RFI on behalf of an overseas authority

Occupation	Hourly cost of labour (£)	Hours of time diverted from business activity		Total labour cost (£)	
		Low	High	Low	High
Corporate managers and directors	37.62	12	24	500	900
Internal Legal professional	44.15	20	40	900	1,800
Administrative occupations: office managers and supervisors	22.64	20	50	500	1,100
Administrative occupations: records	17.03	20	50	300	900
External Legal	512.00	35	70	18,000	35,800
Total (rounded to £1000s)				**20,000**	**41,000**

541. Given that RFI requests will most likely involve larger businesses there are no affordability concerns around this measure given that costs will likely be a very small proportion of their annual turnover.

542. The proposal does not impose any costs on consumers as only businesses will be involved in RFIs. The benefits delivered by strengthened investigative assistance powers are expected to greatly outweigh the costs as overseas reciprocity resulting from assistance from the CMA helps to excel casework conducted within the UK. This will promote competitive outcomes in the UK and deliver benefits to both consumers and businesses.

543. Furthermore, the provision allows the discretion for the CMA or relevant authority to seek reimbursement from the overseas authority seeking assistance and therefore is cost neutral for the Exchequer.

Permitting more effective and flexible international cooperation by updating the rules governing information sharing between authorities

544. Impacts for this measure have not been quantified due to the complex nature of international co-operation and lack of available quantitative evidence to formulate robust assumptions with.

545. This proposal creates a more flexible and efficient legal framework to support international cooperation between relevant UK authorities and their international

counterparts. This is achieved through broadening the gateways governing information exchange.

546. This measure may introduce some additional costs to businesses where widened gateways result in more frequent evidence exchange which in turn may involve businesses dedicating additional resource to engaging with the CMA concerning the requests. Government expects the number of businesses affected by gateways to be very small relative to the UK business population given that only a subsection of information exchange may involve additional engagement between the CMA and businesses.

547. Government expects that the improved international cooperation facilitated by more flexible information sharing gateways will improve the CMA's ability to collect evidence. Where the CMA's information gathering powers are bolstered their case decisions involving businesses active in other jurisdictions will also be enhanced. Pro-competitive outcomes will arise where evidence shared through international gateways supports the conclusion of cases affecting UK markets to the benefit of UK businesses and consumers.

548. Overall, the wider benefits offered by the information gained by the CMA through international cooperation, and an improved international standing in general, have been concluded to significantly outweigh the costs described. Considering this, the measure is expected to deliver a net benefit to society.

Tougher, turnover-based penalties for businesses which fail to comply with the CMA's investigation gathering powers across the CMA's enforcement tools.

549. Penalties for non-compliance with investigation gathering powers play an important role in ensuring cases run as efficiently as possible and enable the CMA to arrive at the right case decisions. Currently, the CMA's powers against non-compliant businesses, through civil penalties and criminal sanctions, are not having the requisite deterrent effect on businesses.

550. Through increasing the level of penalties available to the CMA for non-compliance and introducing new civil penalties where only criminal offences currently exist, businesses will be more incentivised to comply with the evidence gathering powers set out by EA02 and CA98 as not doing so becomes more costly. Where tougher sanctions lead to the avoidance of disruptions arising from non-compliance, the CMA will be able to conduct its casework more quickly and therefore save costs relative to a situation where case forming information is not provided. Furthermore, where provided information leads to higher quality and quicker decision making both consumers and businesses will benefit from the resolution of anti-competitive behaviour.

551. This measure is not expected to deliver any additional costs on businesses given that penalties will only be issued to businesses who have broken the law. Overall, this proposal is expected to deliver a net benefit to society as the businesses who would consider not complying with the CMA's evidence gathering activities will be deterred from doing so and subsequent cases can be conducted without unnecessary delays.

Enabling the CMA to impose civil turnover-based penalties for non-compliance with orders or directions imposed by the CMA, or undertakings and commitments accepted by the CMA, across its competition enforcement functions.

552. The introduction of turnover-based penalties is expected to increase compliance and deter businesses that refuse to conform with remedies imposed or accepted by the CMA. This proposal is not expected to introduce an additional cost to

businesses as civil penalties will only be imposed on those businesses which have not complied with a remedy imposed or accepted by the CMA under CA98 and EA02.

553. Orders and directions imposed, or commitments and undertakings accepted by the CMA across competition cases bring investigations to an end and are essential in remedying the concerned anti-competitive effects within the CA98 and EA02 frameworks. The resolution of anti-competitive elements and behaviours in this manner brings significant benefits to consumers and businesses alike as markets can operate more efficiently and offer more choice and better prices. The extent to which improved outcomes will be delivered by compliance depends on the nature of the case, but the expected benefits have the potential to be very large in markets studies and investigations where wide reaching undertakings or commitments may be accepted by the CMA. The proposal will also impose no costs on consumers given that only non-compliant businesses will be issued civil penalties.

554. Furthermore, this measure is expected to offer savings to the Exchequer given that improved compliance will enable the CMA to dedicate more time to other areas of its casework as opposed to issuing and chasing follow-up orders.

555. Overall, this measure is expected to deliver a significant net benefit to society arising from the removal of more anti-competitive behaviour and at a quicker rate through increased compliance with the CMA's remedies.

A new "Duty of Expedition" applying to the CMA in respect of its investigations

556. Reflecting the need to conduct swift investigations through an expanded duty of expedition will help to ensure that cases proceed efficiently.

557. Pro-competitive outcomes will be delivered to markets sooner where the duty triggers more expedient case work from the CMA across its enforcement functions (including digital) relating to enforcement. The swifter resolution of anti-competitive behaviour will also resolver consumer detriment sooner and remove anti-competitive practices before markets potentially begin to suffer from deeper rooted distortions because of these practices.

558. Moreover, a clear signal that the CMA should undertake investigations in an expedient manner may offer benefits to business from increased certainty granted to markets following the swifter conclusion of investigations. Again, this would likely benefit businesses involved in investigations considering reports they take too long.

559. The impacts of this measure have not been quantified given a lack of quantitative evidence to formulate assumptions on how much the duty will speed up the CMA's casework. That said, this statutory duty is not expected to impose any costs on businesses or consumers given that all the appropriate safeguards will remain in place to ensure businesses are subject to fair investigations. However, the duty may lead to a cost saving to the Exchequer following more efficient case work from the CMA.

560. Overall, the expanded duty of expedition is expected to deliver a net benefit to society arising from the quicker conclusion of the CMA's casework and the subsequent benefits experienced by businesses and consumers.

Designating the CMA as a specified prosecutor able to enter into agreements with assisting offenders

561. Government expects that this measure will significantly enhance the CMA's evidence gathering powers during its investigations. Cartels operate covertly and leave little evidence of their activity with which the CMA can build cases. This

makes defendants who are willing to provide information in exchange for immunity a crucial avenue to gather evidence. By designating the CMA as a specified prosecutor, the CMA can effectively enter into agreements with a higher number of assisting offenders compared to the current business-as-usual where the CMA must rely on 'no-action' letters.

562. Cartels cause considerable harm to consumers and businesses through price fixing and market sharing which can lead to higher prices and less choice. Furthermore, this will undermine the contestability of a market as new entrants are effectively blocked from entering the market by the cartels market sharing agreement. Enabling the CMA to enter into more agreements with assisting offenders will enhance the CMA's ability to detect, investigate and prosecute cartels through alleviating the CMA's informational disadvantage. The prosecution of cartels brings significant benefits to both consumers and businesses as market distorting agreements between participants are removed. This proposal may also lead to the swifter conclusion of cartel cases as assisting offenders offer more evidence and transparency to investigations. The quicker conclusion of cases will lead to Exchequer cost savings arising from more efficient CMA casework.

563. This measure will not introduce any additional costs on consumers given that they are not directly impacted by agreements entered into between the CMA and assisting offenders. There may be some additional costs introduced to the CMA who must bear the costs of negotiating the agreement and working with an assisting offender, however this may be counteracted by the efficiency benefits the provided transparency brings to an investigation.

564. Overall, this measure is expected to a deliver a net benefit to society through enabling the CMA to gather more evidence related to cartels. Where enhanced transparency leads to the prosecution of cartels and elimination of cartel agreements, both consumers and businesses will benefit from higher levels of competition in the affected markets.

Total Impact of Cross-cutting Reforms

565. Overall, the package of cross-cutting measures is expected to deliver significant benefits through a strengthened evidence gathering framework, more flexible international co-operation, swifter investigations and more effective remedies across the CMA's competition tools.

566. The proposals are expected to predominantly affect businesses involved in the CMA's investigations and are not expected to directly affect consumers. Government expect that consumers will indirectly benefit from swifter and higher quality CMA decisions as a result of the reforms.

567. Given that the amendments proposed across EA02, CA98 and digital markets do not significantly change existing processes, and in some cases update existing law, the package of measures is not expected to impose large costs on the relatively small number of businesses involved in the CMA's activities on a yearly basis.

568. Where quantification of costs to business has been conducted, the measures are expected to result in an annual cost to business of £0.08m to £0.16m. (£2021 prices).

569. The central estimate has an associated EANDCB of £0.1m (2020 base year). **As discussed, this EANDCB relates entirely to non-qualifying regulatory provisions (pro-competition measures) and so the BIT score of these changes is £0.5m.** The expected benefits delivered to consumers and businesses are expected to outweigh the costs of the reforms.

570. A significant portion of the expected costs remain unquantified due to a lack of robust evidence to base assumptions on and therefore do not contribute to the presented EANDCB. These costs have been assessed qualitatively. Given that many of the reforms aim to streamline and improve the existing regimes, many of the benefits to businesses arising from more efficient markets and antitrust cases also remain unquantified. This approach towards assessing costs has been deemed appropriate considering the scope for the unquantified costs and benefits to cancel one another out.

Public sector equality duty

571. This section concerns changes that apply across the CMA's functions as granted in EA02 and CA98. Therefore, the relevant PSED assessment can be found in the respective section of this document.

Impact on small and micro businesses

572. This section concerns changes that apply across the CMA's functions as granted in EA02 and CA98. Therefore, the relevant SAMBA assessment can be found in those respective sections of this document.